(14)

No. 91-1671-CFX Title: William J. Mertens, Alex W. Bandrowski, James A. Clark, and Russell Franz, Petitioners
Status: GRANTED

v.

Hewitt Associates

Docketed:
April 14, 1992 Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Kobrick,Jeffrey

Counsel for respondent: Quaini,Duane C.

Entry	Date	Note	Proceedings and Orders
1	Apr 14 1992	G	Petition for writ of certiorari filed.
2	May 15 1992		Brief of respondent Hewitt Associates in opposition filed.
3	May 20 1992		DISTRIBUTED. June 5, 1992
4	Jun 8 1992	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
5	Sep 4 1992		Brief amicus curiae of United States filed.
6	Sep 9 1992		REDISTRIBUTED. September 28, 1992
7	Oct 5 1992		Petition GRANTED.
			**
8	Nov 19 1992		Brief amicus curiae of American Association of Retired Persons filed.
9	Nov 19 1992		Brief amicus curiae of United States filed.
10	Nov 19 1992		Brief of petitioners filed.
11	Nov 19 1992		Joint appendix filed.
12	Nov 23 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
13	Dec 7 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
14	Dec 21 1992		Brief amicus curiae of American Society of Pension Actuaries filed.
15	Dec 21 1992		Brief amicus curiae of American Academy of Actuaries filed.
16	Dec 21 1992		Brief amicus curiae of American Council of Life Insurance filed.
17	Dec 21 1992		Brief of respondent Hewitt Associates filed.
19	Dec 21 1992		Brief amici curiae of Booke & Company, et al. filed.
18	Dec 28 1992		SET FOR ARGUMENT MONDAY, FEBRUARY 22,1993.(4TH CASE).
20	Jan 4 1993		CIRCULATED.
21	Jan 22 1993	X	Reply brief of petitioners filed.
22	Feb 1 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
23	Feb 8 1993		Record filed.
		*	Original proceedings United States District Court for the Northern District of California. (BOX)
24	Feb 22 1993		ARGUED.

1 pp

91-1671

No. 91_

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM J. MERTENS, ALEX W. BANDROWSKI,
JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED

Does ERISA § 502(a)(2) and/or (a)(3), 29 U.S.C. § 1132(a)(2) and (3), allow pension plan participants and beneficiaries to bring an action on behalf of a retirement plan for recovery of monetary losses against a non-fiduciary service provider who knowingly participates in breaches of fiduciary duty committed by an ERISA fiduciary?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the petitioners sued two other parties: the Kaiser Steel Retirement Plan ("Plan"), and the Pension Benefit Guaranty Corporation ("PBGC"), which had terminated the Plan pursuant to ERISA's distress termination provisions. Petitioners sued the PBGC in its capacity as the Plan's statutory trustee. The PBGC answered and filed a cross-claim in which it asserted that any recovery by the plaintiffs should be paid to it. The district court granted Hewitt's motion for dismissal of the PBGC's cross-claim as "derivative" of the complaint. *Sua sponte*, the district court also dismissed the Plan and the PBGC "since no distinct allegations were directed against them. . . ." (A28). The PBGC did not appeal on behalf of the Plan or itself as the statutory trustee.

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v.
HEWITT ASSOCIATES, an Illinois Partnership, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on November 4, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 948 F.2d 607, and is reprinted in the appendix hereto, p. A1, *infra*.

The memorandum decision of the United States District Court for the Northern District of California (Patel, D.J.) has not been reported. It is reprinted in the appendix hereto, p. A17, *infra*.

JURISDICTION

On January 15, 1992, the court of appeals denied a timely petition for rehearing (A15), after first granting the Secretary of Labor's Motion for Leave to File her Brief Amicus Curiae in support of rehearing *en banc*. (A14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 409(a), 29 U.S.C. § 1109(a), provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

ERISA § 502(a), 29 U.S.C. § 1132(a) provides in relevant part:

A civil action may be brought --

(1) * * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violated any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) * * *

(5) * * * by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) * * *

ERISA § 502(l), 29 U.S.C. § 1132(l) provides:

(1) In the case of (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) -- (A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that (A) the fiduciary or other person acted reasonably and in good faith, or (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax

imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986.

STATEMENT OF THE CASE

The court of appeals in this case held that ERISA does not afford pension plan participants a cause of action against the plan's actuary for knowingly participating in breaches of fiduciary duty committed by the plan's fiduciaries which resulted in the distress-termination of the underfunded plan. The court's decision, consistent with its earlier opinion in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1984), conflicts directly with the reported decisions of the Second, Sixth, Seventh, and District of Columbia Circuit Courts of Appeal. All of these courts have recognized the liability under ERISA of non-fiduciaries for knowingly participating in a fiduciary breach. Only the Eleventh Circuit Court of Appeal agrees with the Ninth Circuit in refusing to recognize non-fiduciary liability under ERISA for such aiders and abetters of ERISA fiduciary breaches.

Upon taking over the Plan pursuant to ERISA's distress termination provision, 29 U.S.C. § 1341, the PBGC stated through its Executive Director that "The company's funding of the plan was grossly inadequate to pay the benefits promised . . . ." (*BNA Pension Reporter*, p. A-5, March 11, 1987). As a result of the Plan's "gross" underfunding, the petitioners, all long-term management employees of Kaiser Steel, suffered substantial reductions in their monthly pension benefits.[1]

[1] Petitioner Mertens suffered a reduction in his monthly pension from $2,016.00 to $521.00, petitioner Bandrowski from $1,907.00 to $670.00, petitioner Clarke from $2,567.00 to $1,103.00 and petitioner Franz from $1,426.00 to $478.00. (A3; R.E. 21:10-19).

The court of appeals opinion sets forth petitioners' allegations against Hewitt Associates ("Hewitt"), the actuary for the Kaiser Steel company, which it accepted as true in reviewing the district court's dismissal of the action against Hewitt pursuant to F.R.Civ.P. 12(b)(6):

> . . . Kaiser hired Hewitt to perform actuarial work for its ERISA plan. Early in 1980, Kaiser restructured its business operations and virtually eliminated its steel-making operations. As a result, the number of employees retiring from the company who were entitled to early retirement benefits under the plan increased significantly, as did the plan's funding costs.
>
> The actuarial assumptions Hewitt had developed previously for the plan did not reflect the increased costs, and Hewitt did not change its assumptions to reflect the increase. Rather, Hewitt delegated the responsibility for selecting actuarial assumptions to Kaiser.
>
> According to the plaintiffs, Hewitt's conduct was improper. Had Hewitt employed proper actuarial assumptions, Kaiser would have had to make substantially higher contributions to the plan. Hewitt failed to disclose this funding inadequacy in any certificate or other writing which it prepared on behalf of the plan. As a consequence of Hewitt's acts and omissions, Kaiser failed to fund the plan adequately, and the plan's assets became insufficient to satisfy benefit commitments, including the commitment to pay the plaintiffs their fully vested pensions. (A2-A3).

The petitioners further alleged: that Hewitt did actuarial work for Kaiser Steel at the same time it performed services for the plan; that Hewitt did not want to jeopardize its lucrative professional relationship with Kaiser; and that it failed to disclose to plan administrators its relationship with Kaiser or

the potential conflict that the relationship created. (A3).

Petitioners asserted three separate legal theories under ERISA against Hewitt:

(a) Hewitt breached its fiduciary duties to the Plan;

(b) Hewitt knowingly participated in a breach of fiduciary duty; and,

(c) Hewitt breached its actuarial duties to the Plan. (A3).

Petitioners also alleged that Hewitt committed professional malpractice under California law and invoked the Court's pendent jurisdiction. (A3).[2]

The district court had subject matter jurisdiction over petitioners' claims under 29 U.S.C. § 1132(e), and the Declaratory Judgment Act, 28 U.S.C. § 2201. It had pendent jurisdiction over the state law malpractice claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966).

On March 7, 1990, Hewitt moved to dismiss the Complaint under F.R.Civ.P. 12(b)(6) on the grounds that the Complaint failed to state a claim for which relief could be granted and that the applicable California statute of limitations barred plaintiffs' pendant state law claim for professional malpractice.

On August 9, 1990, the district court dismissed all of petitioners' claims and entered judgment in favor of respondent. (A27-28). The district court held that Hewitt

[2] The petitioners also alleged that Hewitt engaged in a prohibited party-in-interest transaction (R.E. 27:17-28:11). The district court dismissed this claim; plaintiffs did not appeal that dismissal.

could not be held responsible for losses suffered by plaintiffs because: (1) The Complaint did not allege sufficient facts to warrant a finding that Hewitt acted as a fiduciary under ERISA; (2) ERISA provides no remedy against a non-fiduciary who participates in a breach of fiduciary duty; (3) ERISA provides no remedy for Hewitt's alleged breach of professional actuarial duties; and (4) the applicable statute of limitation barred plaintiffs' state law malpractice claim.

Petitioners filed a timely Notice of Appeal on August 25, 1990. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. In its November 4, 1991 decision, the Ninth Circuit affirmed the dismissal of all of petitioners' ERISA-based claims, but reversed and remanded the district court's dismissal of petitioners' pendent state professional malpractice claim. (A13). Petitioners ask the Court to review only the court of appeals holding, based on *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), that non-fiduciaries are not liable under ERISA for knowingly participating in fiduciary breaches.[3]

The court rested this holding on its conclusion that Congress' enactment of the Omnibus Budget Reconciliation Act ("OBRA") of 1989 and its addition of a new ERISA enforcement provision, 29 U.S.C. § 1132(l), did not clarify Congress' intent to permit suits by pension plan participants or beneficiaries against non-fiduciaries who knowingly aid and abet a fiduciary in the commission of a breach of fiduciary duty.[4] (A6-A8).

[3] This petition does not raise two of petitioners' ERISA-based claims: (1) that Hewitt breached its fiduciary duties to the Plan (A4-A6) and (2) that Hewitt breached its actuarial duties to the Plan (A9-A11).

[4] ERISA § 502(l), 29 U.S.C. § 1132(l), enacted on November 21, 1989, requires the Secretary of Labor to assess a civil penalty in the case of, *inter alia*, "any knowing participation in [a fiduciary] breach or violation [of ERISA] by any other person." The penalty constitutes a percentage of the total recovery from "a fiduciary or other person with respect to a breach

Noting that section 1132(l) applies "to the Secretary only, not to plan participants" (A8), the Ninth Circuit, citing *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), declined to read the recent Congressional enactment as indicating that, contrary to *Nieto*, sections 502(a)(3) and (5), 29 U.S.C. §§ 1132(a)(3) and (5), had always imposed liability on a non-fiduciary who knowingly aids and abets an ERISA fiduciary in breaching his ERISA duties. (A8). Rather, the court believed that the amendment *created*, for the first time, a cause of action by the *Secretary* against non-fiduciaries under §§ 502(a)(3) and (5), but not on behalf of plan participants and beneficiaries. (A8).

REASONS FOR GRANTING WRIT

I. THE NINTH CIRCUIT'S DECISION BELOW, IN CONFLICT WITH DECISIONS OF FOUR OTHER CIRCUIT COURTS OF APPEAL, UNDERMINES THE CONSISTENT AND UNIFORM NATIONAL APPLICATION OF ERISA'S REMEDIAL PROVISIONS

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). As this Court noted, by enacting ERISA, Congress intended to "preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Id.* at 99, citing 120 Cong. Rec. 29933 (1974) (remarks of Sen. Harrison Williams). The Ninth Circuit's decision to follow *Nieto* conflicts with the decisions of four other courts of appeal and the decisions of the vast majority of district courts which have addressed the issue of non-fiduciary liability under ERISA.

or violation" in an action instituted by the Secretary pursuant to ERISA § 502(a)(2) or (5), 29 U.S.C. § 1132(a)(2) or (5). *See* discussion A15-19.

The courts which have recognized the liability of non-fiduciaries have held that ERISA incorporates this principle from trust law. ERISA's legislative history confirms that Congress intended to incorporate into ERISA fiduciary principles developed in the law of trusts. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). In light of this legislative history, this Court has directed the lower courts to develop a "federal common law of rights and obligations under ERISA-regulated plan." *Firestone, supra* (quoting *Pilot Line Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Under the law of trusts, it is a well-established principle that a knowing participant in a fiduciary breach can be jointly and severally liable for the full amount of the loss sustained as a result of that breach.[5]

Although ERISA contains no provision specifically imposing liability on non-fiduciaries, that liability stems from the broad enforcement authority conferred upon participants, beneficiaries and fiduciaries by Section 502(a)(3) of the Act, 29 U.S.C. § 1132 (a)(3), and upon the Secretary of Labor by Section 502(a)(5), 29 U.S.C. § 1132(a)(5). Under *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985), a court determining whether ERISA implies a cause of action against non-fiduciaries must apply the four-factor analysis in *Cort v. Ash*, 422 U.S. 66 (1975). Under *Cort*, a court may imply a cause of action in a statute if:

[5] The elements of knowing participation in a fiduciary breach are "(a) an act or omission which furthers or completes the breach, and (b) actual or constructive knowledge at the time that the transaction amounted to a breach or the legal equivalent of such knowledge." *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1396 (D. Nev. 1984). See also, *Thornton v. Evans*, 692 F.2d 1064, 1078, n. 34 (7th Cir. 1982) ("[a] necessary element of plaintiff's claims against the non-fiduciary defendants is that they conspired with the fiduciaries. . . ."); G. Bogert, *The Law of Trusts and Trustees*, § 901, at 258-259 (rev. 2d ed. 1982).

(1) the plaintiff is one of the class for whose benefit the statute was enacted;

(2) there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;

(3) such a remedy would be consistent with the underlying purposes of the legislative scheme; and

(4) it is appropriate to infer a cause of action based solely on federal law.
(Id. at 78).

Cort factors one and four undisputedly favor an implied cause of action. The courts which have found legislative intent favoring a cause of action against non-fiduciaries look to the civil enforcement provisions of section 1132, 29 U.S.C. §§ 1132(a)(3), 1132(a)(5), which allow private parties and/or the Secretary of Labor to bring an action to enjoin any act or practice that violates the terms of ERISA or the terms of the plan, and to obtain "other appropriate equitable relief." These courts then inferred from section 1132 and from ERISA's legislative history that Congress intended ERISA to federalize the common law of trusts.[6] This analysis is consistent with

[6] *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (principals in, and affiliates of, corporation which breached fiduciary duties held liable as knowing participants in breach); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (non-fiduciary liable for assisting fiduciary co-defendant in scheme to cause plans to use assets in ways which benefited defendants); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (*dictum*); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982) (holding, on a motion to dismiss, that a non-fiduciary, alleged to have conspired with a fiduciary to mislead other fiduciaries into taking action which harmed plan, can be held liable under ERISA); *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989) ([A]lthough Klepak was not a statutory fiduciary, he was, as the district court held, jointly liable

the directive in *Firestone, supra*, 489 U.S. at 110, that courts develop a "federal common law of rights and obligations under ERISA-regulated plans."

Under the law of trusts, it is a well-established principle that a knowing participant in a fiduciary breach can be jointly and severally liable for the full amount of the loss sustained as a result of that breach. See G. Bogert, *The Law of Trust and Trustees*, §§ 868, 901 (rev. 2d ed. 1982); 4 A. Scott, *The Law of Trusts*, §§ 290-295, 321-326 (3d ed. 1967 & Supp. 1985); *Restatement (Second) of Trusts*, §§ 290-297, 321-326 (1959).

In arriving at a result contrary to that reached by the vast majority of courts addressing the issue of ERISA non-fiduciary liability, the Ninth Circuit in *Nieto* concluded from the liability provisions of section 1109(a) (which provides that "[a]ny person who is a fiduciary" shall be "personally liable" for any breach of fiduciary duty) that had Congress intended to include non-fiduciaries, it would have done so explicitly. *Nieto*, 854

. . . as a non-fiduciary who knowingly participated in a breach of trust") (citations omitted); *Brock v. Gerace*, 635 F. Supp. 563, 568 (D. N.J. 1986) (holding, on motion to dismiss, that non-fiduciaries may be liable even where they did not directly deal with fiduciaries); *Foltz v. U.S. News and World Report*, 627 F. Supp. 1143, 1167-8 (D. D.C. 1986); *Donovan v. Bryans*, 566 F. Supp. 1258, 1267 (E.D. Pa. 1983); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 642 (W.D. Wis. 1979) (liability imposed on non-fiduciaries who, despite being advised by their mutual attorney that plan trustees were breaching their duties in a transaction, ignored the advice and completed the transaction).

But *see Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991) (trying to reconcile *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), with *Nieto*, held that "a court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute"); *Framingham Union Hospital, Inc. v. The Travelers Ins. Co.*, 744 F. Supp. 29 (D. Mass. 1990) (following *Nieto*); *Jordan v. Reliable Life Insurance Co.*, 694 F.Supp 822, 829-830 (N.D. Ala. 1988) (*dicta*).

F.2d at 871-874. The court moreover found that interpreting section 1132 to provide causes of action against non-fiduciaries would in effect render section 1109 superfluous, "a result contrary to the fundamental canons of statutory construction." *Id.* at 873.

However, it is clear from later Supreme Court decisions that *Nieto* read *Russell* too broadly when it concluded that the only remedies available to redress fiduciary breaches are those specifically enumerated in the statute. Since *Nieto*, the Supreme Court analyzed section 1132(a) generally, and section 1132(a)(3) in particular, in *Ingersoll-Rand Co. v. McClendon*, ___U.S. ___, 111 S.Ct. 478 (1990), and concluded that the remedial provisions of section 1132 are broad enough to encompass remedies which are *not* specifically enumerated. Although the Court in *Ingersoll* did not discuss in detail what remedies are available as "other appropriate equitable relief" under section 1132(a)(3), the Court, in reversing the judgment below, held that "there is no basis in § 1132(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.'" 111 S.Ct. at 468. The Court added: "It is clear that the relief requested" -- which included a prayer for compensatory damages -- "is well within the power of federal courts to provide." *Id.* Notably, an award of compensatory damages is not specifically enumerated as a remedy available under section 1132. In light of *Ingersoll-Rand*, it is apparent that the Ninth Circuit in *Nieto* and now in this case incorrectly applies *Russell* to support its holding that the *only* remedies available to redress fiduciary breaches are those specifically enumerated in the statute.

As noted, the Supreme Court also recently analyzed section 502(a) in *Firestone, supra*, in the context of an action seeking benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The court stated that since "ERISA abounds with the language and terminology of trust law," it would be "guided by principles of trust law" in determining the

appropriate standard of review of a benefit claims decision. *Firestone*, 489 U.S. at 111. The court noted that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," *id.* at 113, citing *Shaw v. Delta Airlines*, 463 U.S. at 90, and considered it unlikely that "ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 114.

"A fundamental concept of a trust is that courts 'will give such remedies as are necessary for the protection of their interest.'" *Russell*, 473 U.S. at 156-157 (Brennan, J., concurring) (footnote omitted).

A cause of action against non-fiduciaries often is essential in order to deter violations of ERISA's fiduciary responsibility provisions and to ensure that plans have the means to attain complete recovery of all losses caused by such violations. Cf. *Brock v. Gerace*, 635 F. Supp. at 569 (plan's participants would be denied full relief if the Secretary were unable to recover from non-fiduciaries).

The Ninth Circuit also erred in *Nieto* when it focused almost entirely on section 409 of the Act, 29 U.S.C. § 1109, and section 502(a)(2), 29 U.S.C. § 1132(a)(2) (which, as noted, *supra*, authorizes actions to enforce section 409) and concluded that the plain language of the statute limited ERISA's coverage to fiduciaries only. *Nieto*, 845 F.2d at 871-874. The court concluded that interpreting section 1132 to provide causes of action against non-fiduciaries would in effect render section 409 superfluous. *Id.* However, as noted by Judge Wiggins in his opinion concurring in the judgment on other grounds, "By reading section 409(a), 29 U.S.C. § 1109(a), in isolation, [the

court] ignores the clear requirement of the Act to provide the broadest possible remedies under ERISA to plan beneficiaries." *Id.* at 875.

That Congress specified a fiduciary's liability in section 409 does not preclude construing the broad language of sections 29 U.S.C. §§ 1132(a)(3) and (5) to reach a wider class of persons who aid in the commission of a fiduciary breach. As Judge Wiggins also noted, section 409(a) "is simply one section among many that impose liability on those who violate the substantive provisions" of ERISA. *Id.*

Indeed, as Justice Brennan pointed out in his concurring opinion in *Russell*, "The legislative history demonstrates that Congress intended federal courts to develop federal common law *in fashioning the additional 'appropriate equitable relief,'"* provided for in sections 1132(a)(3) and (5). 473 U.S. at 156. (Emphasis added.) Justice Brennan further notes that "trust-law remedies are equitable in nature and include provision of money damages." (Citing trust law authorities.) *Id.* at 152 n. 10. The broad provision by Congress that federal courts provide "appropriate" equitable relief is a clear mandate to fashion all remedies which are appropriate to enforce the Act. It should be construed to include make-whole relief against non-fiduciaries who knowingly participate in bringing about violations of ERISA.

Furthermore, the decision in *Nieto* is internally inconsistent. Although the court refused to recognize a claim under the Act against a non-fiduciary knowing participant, it did rule that a non-fiduciary could be liable in an action brought pursuant to section 1132(a)(3) when the non-fiduciary acted as a "party in interest" (29 U.S.C. § 1002(14)(b)) and engaged in a prohibited transaction (29 U.S.C. § 1106(a)). The court acknowledged that the broad equitable relief provided in section 1132(a)(3) (and therefore section 1132(a)(5)) "is not limited to fiduciaries." *Id.* at 874. The court determined that

benefited from engaging in prohibited transactions, despite the fact that ERISA does *not* expressly bar parties in interest from engaging in prohibited transactions or explicitly provide relief from them for such actions. The court reasoned that "[c]ourts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them." *Id.*

There is, furthermore, no basis in the language of section 1132(a)(3) or (5) to read those provisions so as to permit lawsuits against non-fiduciaries who engage in prohibited transactions, but not against those who knowingly participate in fiduciary breaches. The court's interpretation provides inadequate protection for employee benefit plans because not all non-fiduciary participants in fiduciary breaches are parties in interest and not all fiduciary breaches are prohibited transactions.

This case presents the Court with the opportunity to overrule *Nieto*, thereby resolving a major conflict and maintaining uniform enforcement of the Act.

II. CONGRESS' 1989 AMENDMENT OF ERISA, WHICH REQUIRED THE SECRETARY OF LABOR TO PURSUE CIVIL PENALTIES AGAINST NON-FIDUCIARIES WHO KNOWINGLY PARTICIPATE IN FIDUCIARY BREACHES, CLARIFIED ITS ORIGINAL INTENT TO IMPOSE ERISA LIABILITY ON AIDERS AND ABETTERS OF FIDUCIARY BREACHES

The intent of Congress to include relief against knowing participants is clear from the enactment of the Omnibus Budget Reconciliation Act of 1989, which contained numerous amendments to ERISA. P.L. 101-239. These amendments added a new subsection ("l") to ERISA § 502, 29 U.S.C. § 1132, which requires the Secretary of Labor to pursue civil penalties against knowing participants in fiduciary breaches:

penalties against knowing participants in fiduciary breaches:

> In the case of --
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or (B) **any knowing participation in such breach or violation by any other person**, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.[7]
> (29 U.S.C. §1132(l); emphasis added.)

The penalty referred to in section 1132(l) is "an amount equal to 20 percent of the applicable recovery amount." The term "applicable recovery amount" is defined at section 1132(l)(2) as "any amount which is recovered from a fiduciary or other person with respect to a breach or violation," pursuant to a settlement agreement, or "ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5). But there could be no such recoveries from non-fiduciaries unless those provisions already encompassed relief from non-fiduciaries. By so providing, the OBRA amendment gives rise to the inescapable presumption that the Secretary always had the power to institute litigation against non-fiduciaries under sections 1132(a)(2) and (a)(5).

Section 1132(a)(2) provides that suit may be brought by the Secretary *or* by plan participants for relief under 29 U.S.C. § 1109. Thus, if the Secretary may sue non-fiduciary aiders and abetters under section 1132(a)(2), then plan participants must also have the right to sue derivatively on behalf of the ERISA

[7] Congress thought that the mandatory imposition of a civil penalty would deter potential breaches of fiduciary duty by fiduciaries and non-fiduciaries who knowingly assist them in such breaches. H.R. Conf. Rep. No. 101-386, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. and Admin. News 3018, 3035-36.

plan.

Similarly, if the Secretary can bring an action against a non-fiduciary under subsection 1132(a)(5), then a plan participant must have the corresponding right to sue non-fiduciaries under subsection 1132(a)(3). The relevant language in subsections 1132(a)(3) and (a)(5) is identical; identical statutory language must be given the same effect. *See Firestone v. Howerton*, 671 F.2d 317, 320 n. 6 (9th Cir. 1982) ("when the same terms are used in different sections of a statute they receive the same meaning"); *Mid Jersey Trucking Industry Pension Fund v. Omni Funding Group*, 731 F. Supp. 161, 178 n. 11 (D.N.J. 1990) (treating sections 1132(a)(3) and (a)(5) as the same for purposes of implying a cause of action for knowing participation in a breach of fiduciary duty).[8]

In rejecting the foregoing analysis, the Ninth Circuit misconstrued the plain language of section 1132(l), which does not, as the court incorrectly concluded, *create* a new cause of action by the Secretary against aiders and abetters. Rather the amendment simply created a civil penalty provision which comes into play only if the Secretary has recovered money from a non-fiduciary either through settlement or through a section 1132(a)(5) judicial proceeding. Therefore, instead of creating a new cause of action against non-fiduciaries, section 1132(l) simply assumed that the underlying cause of action against non-fiduciary aiders and abetters already existed in section 1132(a). *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1968) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction").

[8] Section 1132(l)(2)(B) also supports the conclusion that plan participants may institute an ERISA action against aiders and abetters of fiduciary breaches under either subsection 1132(a)(2) or (a)(3). *See Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1349 (10th Cir. 1987) ("the use of a disjunctive in a statute and regulations indicates that alternatives were intended").

Indeed, nothing in ERISA's remedial scheme, which vests virtually co-extensive enforcement rights in both the Secretary and participants, supports the Ninth Circuit's conclusion that Congress intended to afford the Secretary, but not private plan participants and beneficiaries, the exclusive right to recover against non-fiduciaries. As noted, the enforcement language in section 1132(a)(2) applies both to the Secretary and participants, and the language in subsection 1132(a)(3) (relating to participants and beneficiaries) is identical to that in 1132(a)(5) (relating to the Secretary).

Nevertheless, the Ninth Circuit declined to read the OBRA amendment to ERISA as indicating that section 1132, contrary to *Nieto*, always imposed liability on a non-fiduciary who knowingly aids and abets an ERISA fiduciary in breaching his duties: "In drafting the ERISA amendments in 1989, Congress considered but rejected an amendment to overrule our decision in Nieto. (Citations omitted.) We decline to do what Congress has refused to do." (A9).

The court observed that an early version of OBRA, H.R. 3299, would have added a new section 409(c), 29 U.S.C. § 1109(c), that explicitly stated that persons who knowingly participate in a breach of fiduciary duty "shall be personally liable to the plan for such breach of fiduciary responsibility in the same manner and to the same extent as if they were a fiduciary committing such breach." H.R. 3299, 101st Cong., 1st Sess., § 3161(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). The report on H.R. 3299 states that the purpose of proposed section 409(c) was to resolve "the conflict in the courts of appeal by clarifying Congressional intent to codify in ERISA the common law of trusts as it applies to employee benefit plans." H.R.Rpt. 101-247, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Cong. Code. and Ad. News 1906, 1969-70.

However, Congress' omission in the final amendment of language explicitly overruling *Nieto* does not indicate approval

of *Nieto*. At the time Congress enacted OBRA, all of the other circuits which had addressed the issue of non-fiduciary liability had concluded that such liability existed under ERISA. The amendment that Congress did in fact pass clearly indicated that Congress approved these decisions as reflecting the correct interpretation of the statutory text as written. The amendment strengthens the statute as to non-fiduciary liability by imposing penalties in addition to allowing recovery for all losses against the non-fiduciary who participates in the breach of duty by a fiduciary. Therefore, to the extent that Congress may have failed to explicitly overrule *Nieto*, such "[c]ongressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *PBGC v. LTV Corp.*, ___ U.S. ___, 110 S.Ct. 2668, 2678 (1990) (quoting *U.S. v. Wise*, 370 U.S. 405, 411 (1962)).

In addition, section 1132(l)(3)(B) makes it clear that the phrase "appropriate equitable relief" in §§ 1132(a)(3) and (5) includes the remedy of restoration of "all losses to the plan." Under § 1132(l)(3)(B), the Secretary may waive or reduce the civil penalty if imposition of the penalty would interfere with the non-fiduciary's ability "to restore all losses to the plan without severe financial hardship." This waiver criterion would be meaningless if the non-fiduciary were not, in the first instance, liable for "all losses to the plan."

III. THE NINTH CIRCUIT'S NARROW CONSTRUCTION OF ERISA AND REFUSAL TO INCORPORATE NON-FIDUCIARY LIABILITY FOR KNOWINGLY PARTICIPATING IN A BREACH OF FIDUCIARY DUTY THREATENS EFFECTIVE PROTECTION OF EMPLOYEE BENEFIT PLANS

This Court should not let stand interpretations of ERISA which provide beneficiaries and participants with substantially

less protection than they had before ERISA was enacted. Prior to ERISA, under the law of trusts, courts imposed liability on third persons who knowingly assisted or participated in a breach of fiduciary duty. ERISA was a reform statute. It would be ironic if it were interpreted to provide less protection to pension plan participants and beneficiaries than they had before ERISA.

Liability of non-fiduciaries who knowingly participate in breaches of fiduciary duty is essential to the complete protection of participants and beneficiaries. Trustees often cannot carry out violations of ERISA without the active cooperation of third parties. Third party liability is also important to provide complete relief. The trustees may be judgment proof or otherwise not able to provide complete relief restoring fully all losses suffered by a plan. It is difficult to believe that Congress intended to eliminate this protection which was deemed essential even before the passage of ERISA. "[No] sound reason appears why ERISA should be emasculated by a construction which precludes civil actions against non-fiduciaries." *Donovan v. Unicorn Group*, 3 Employee Benefits Cases 1665, 1667 (S.D.N.Y. 1982).

A. *Under the Law of Trusts, Third Persons Who Knowingly Assist in Breaches of Fiduciary Duty Are Liable to the Trust Beneficiaries*

The common law of trusts imposes liability on third persons who knowingly participate in a breach of trust. A trust beneficiary had a reasonable expectation that third persons had a corresponding duty not to knowingly participate in a breach of trust. *See* G. Bogert & Bogert, *The Law of Trusts & Trustees*, section 326 (1959) (third person who knowingly participates in breach of trust is liable to beneficiary for any loss thereby caused). *See also* Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 481 (1921) (trust law places liability on third person for knowingly participating with fiduciary in breach of trust).

At common law, "Courts will always impose liability for knowing participation in any fiduciary breach of duty." Comment, *Nieto v. Ecker, Incorporation of Nonfiduciary Liability Under ERISA*, 73 Minn. L. Rev. 1303, 1311 (1989). Prior to ERISA, both state and federal courts imposed such liability in order to fully protect trust beneficiaries. *See, e.g., Jackson v. Smith*, 254 U.S. 586, 589 (1920) (holding non-fiduciaries who joined fiduciary in sale of trust property to trustee jointly and severally liable for profits obtained); *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493, 498 (9th Cir. 1955) (stating that third person who colludes with fiduciary in committing breach of duty is under duty of restitution to beneficiary); *Whitford v. Reddeman*, 196 Wis. 10, 22, 23, 219 N.W. 361, 365-66 (1928) (recognizing court's power to enforce trust, complete trustee accounting, and hold liable those who assist trustee in violation of trust); *Massie v. Barth*, 634 S.W.2d 208, 211 (Mo. Ct. App. 1982) (holding that third party who has notice that trustee is committing breach of trust and participates with trustee is liable to beneficiary for any loss caused by breach of trust).

The imposition of non-fiduciary liability was thought important for the full protection of the beneficiary. Non-fiduciary third persons often participate in the trustee's breach of fiduciary duty.[9] Perhaps even more critical, fiduciaries

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[9] *See Jackson v. Smith*, 254 U.S. 586, 589 (1921) (third party participated in trustee's sale of trust property); *Carter Oil Co. v. Crude Oil Co.*, 201 F.2d 547, 551 (10th Cir. 1953) (non-fiduciary who knew co-tenant intended to misappropriate payments that should be shared by another co-tenant may be liable for participating in breach of trust); *Marshall v. Lovell*, 19 F.2d 751, 753 (8th Cir. 1927), *cert denied*, 276 U.S. 616 (1928) (trustee bribed by non-fiduciary); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1096 (D.D.C. 1971) (union participated in conspiracy with employee welfare fund trustees and bank president and knowingly allowed plan funds to be held in interest-free accounts); *Malmud v. Blackman*, 278 N.Y. 658, 658, 16 N.E.2d 391, 391 (1938) (*per curium*) (non-fiduciary borrower who accepted usurious loan from trustee held liable for all loss caused to estate); *Xagrans v. Cohn*, 404 Pa. 315, 319, 172 A.3d 291, 293 (1961) (non-

depend on active cooperation from non-fiduciary third parties to enable them to carry out breaches of fiduciary duty. *See, e.g.*, Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 19 (1934) (arguing violations of fiduciary duty do not usually occur without active assistance of others). It was against this background of common law liability that ERISA was enacted in order to provide even greater protection to the participants and beneficiaries of employee benefit plans.

B. Under ERISA, Third Party Liability for Participation in Breaches of Fiduciary Duty is Necessary for the Effective Protection of Participants and Beneficiaries

In interpreting and applying ERISA, most federal courts have recognized that rejection of non-fiduciary liability is inconsistent with the remedial purposes of the Act. The vast majority of federal courts have held that, in conformity with pre-ERISA trust law, ERISA includes a non-fiduciary liability standard for knowing participation in a fiduciary's breach of trust. *See Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); *Dole v. Compton*, 753 F. Supp. 563, 565-569 (E.D. Pa. 1990); *Pension Ben. Guar. Corp. v. Ross*, 733 F. Supp. 1005, 1008 (M.D. N.C. 1990); *Pension Fund-Local 701 v. Omni Funding Group*, 731 F. Supp. 161, 176-179 (D.N.J. 1990); *Brock v. Gerace*, 635 F. Supp. 563, 566 (D.N.J. 1986); *Foltz v. U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1167-1168 (D.D.C. 1986); *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1395-1396 (D. Nev. 1984); *Donovan v. Bryans*, 566 F. Supp. 1258, 1266-1267 (E.D. Pa. 1983); *Donovan v. Daugherty*, 550 F. Supp. 390, 410-411 (S.D. Ala. 1982); *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 641-642 (W.D. Wis. 1979). *See also Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989) (court assumes but does not expressly determine the existence of such liability).

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fiduciary sellers who induced trustee to make illegal investment held jointly and severally liable for losses of trust property, when they knew or ought to have known of breach of trust although purchase was in name of trustee without trust label); *Whitford v. Reddeman*, 196 Wis. 10, 24, 25, 219 N.W. 361, 366 (1928) (third party aided trustee in deceiving beneficiaries of investment trust regarding financial stability of trust).

This incorporation of non-fiduciary liability is consistent with the entire history and purpose of ERISA. It was the need to better protect plan participants that spurred the passage of ERISA and inspired the Congressional mandate for the courts to develop a "federal common law" in the enforcement of ERISA. Congress envisioned that a "body of [f]ederal substantive law [would] be developed by the courts to deal with issues involving rights and obligations under private welfare pension plans." 120 Cong. Rec. 29942 (1974) (statement of Senator Javits), and that the federal courts would adapt trust law to the particular purposes of employee benefit plans. *See* S. Rep. No. 127, 93d Cong. 2d Sess. 29, reprinted in 1974 U.S. Code Cong. & Admin. News, 4838, 4865. While the statute was detailed, the courts were needed to give it flesh and blood in actual operation. "But Congress realized that the bare terms, however detailed, of these statutory provisions would not be sufficient to establish a comprehensive regulatory scheme. It accordingly empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans." *Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1988). *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989) ("We have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated pension plans'").

The ability to hold third parties responsible for active participation in breaches of duty by fiduciaries is critical to the remedial purposes of ERISA. As mentioned above, non-fiduciaries participate in most fiduciary breaches. Furthermore, in many cases, fiduciaries simply will not be able to carry out such breaches without the active cooperation of third persons. The present case provides a vivid illustration of this fact. Petitioners allege that Hewitt, contrary to its professional responsibilities as the Plan's actuary, knowingly aided and abetted the fiduciaries in allowing the severe underfunding of the Kaiser Steel Retirement Plan. Hewitt acted so as not to jeopardize its lucrative professional relationship with Kaiser on other matters. As a consequence of Hewitt's acts and omissions, the PBGC was forced to terminate the Plan pursuant to ERISA's distress termination procedures. The petitioners and all of the other participants and beneficiaries of the Plan suffered substantial losses in their retirement income.

Courts have recognized, both before and after the enactment of ERISA, that non-fiduciary liability is necessary to provide complete relief to participants and beneficiaries of employee benefits. *See Brock v. Gerace, supra*, at 569: "In the present case, the Local 564 dental plan's participants and beneficiaries *would be denied full relief* if the secretary were unable to recover from [knowingly participating] non-fiduciaries . . . ." (emphasis added); *see also Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-642 (W.D. Wis. 1979) (plan fiduciaries permitted the plan to loan all of its assets back to the sponsoring companies in exchange for unsecured promissory notes); *Lowen v. Tower Asset Management Corp, Inc.*, *supra*, 829 F.2d at 1220-1221 (recognizing necessity of non-fiduciary liability under ERISA to pierce corporate form and prevent channeling of profits from fiduciary breaches to non-fiduciary entities to insulate them from liability under ERISA).

Given that non-fiduciary liability is necessary to fulfill the purpose of ERISA to protect plan participants and

beneficiaries, surely the broad remedial provisions of ERISA encompass this basic remedy. The remedy is not incidental; it goes to the core of ERISA's protection. It is inconceivable that Congress intentionally meant to exclude it from the remedies a federal court may give in enforcing ERISA. "[N]o sound reason appears why ERISA should be emasculated by a construction which precludes civil actions against non-fiduciaries." *Brock v. Gerace, supra*, 635 F. Supp. at 569.

CONCLUSION

For the reasons set forth above, petitioners urge that this Court grant the writ.

Respectfully submitted,

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TABLE OF APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees,

No. 90-1627

D.C. No. C-89-4475-MHP

ORDER

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
August 14, 1991 - Pasadena, California
Filed November 4, 1991

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*
Opinion by Judge Thompson

* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

Plaintiffs, former employees of Kaiser Steel Corporation ("Kaiser") and participants in its ERISA qualified pension plan, brought this action against the plan's actuary, Hewitt Associates ("Hewitt"), for ERISA-based and pendent state claims. The district court dismissed all of the plaintiffs' claims and entered judgment in favor of Hewitt. We affirm the district court's dismissal of the ERISA-based claims, but reverse its dismissal of the pendent state law claim.

FACTS

On a motion to dismiss, all material allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff. *Call v. Sumitomo Bank*, 881 F.2d 626, 630 (9th Cir. 1989). With this in mind, we state the following facts as alleged by the plaintiffs and take these facts as true for the purpose of deciding this appeal.

According to the plaintiffs, Kaiser hired Hewitt to perform actuarial work for its ERISA plan. Early in 1980, Kaiser restructured its business operations and virtually eliminated its steel-making operations. As a result, the number of employees retiring from the company who were entitled to early retirement benefits under the plan increased significantly, as did the plan's funding costs.

The actuarial assumptions Hewitt had developed previously for the plan did not reflect the increased costs, and Hewitt did not change its assumptions to reflect the increase. Rather, Hewitt delegated the responsibility for selecting actuarial assumptions to Kaiser.

According to the plaintiffs, Hewitt's conduct was improper. Had Hewitt employed proper actuarial assumptions, Kaiser would have had to make substantially higher contributions to the plan. Hewitt failed to disclose this funding inadequacy in any certificate or other writing which it prepared on behalf of the plan. As a consequence of Hewitt's acts and omissions,

Kaiser failed to fund the plan adequately, and the plan's assets became insufficient to satisfy benefit commitments, including the commitment to pay the plaintiffs their fully vested pensions.

The plaintiffs further alleged that at the same time Hewitt was performing services for the plan, it was also providing actuarial services to Kaiser. Hewitt did not want to jeopardize this lucrative professional relationship. Hewitt failed to disclose to plan administrators its relationship with Kaiser and the potential conflict that the relationship created.

In October 1986,[1] the Pension Benefit Guaranty Corporation ("PBGC") determined that the plan was underfunded and incapable of paying its liabilities, including the pension benefits owed to the plaintiffs. As a result of the underfunding, the PBGC terminated the plan and began paying the plaintiffs and other plan participants substantially reduced benefits. For example, one plaintiff's monthly check was reduced from $2,016 to $521. Other plaintiffs suffered comparable reductions.

The plaintiffs' complaint alleged three causes of action: a cause of action based on ERISA for "breach of professional duties to the plan;" a cause of action based on ERISA for "unlawful party-in-interest transactions;" and a professional malpractice claim under California law. The PBGC answered and filed a cross-claim in which it asserted that any recovery by the plaintiffs should be paid to it.

Hewitt filed a motion to dismiss the plaintiffs' complaint for failure to state a claim pursuant to Federal Rule of Civil

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[1] The appellants' opening brief stated that the 1986 date in the complaint is incorrect, and that the PBGC actually terminated the plan in February 1987. The resolution of this question is irrelevant to the outcome of this appeal. *See infra* note 10.

Procedure 12(b)(6). It argued that the entire complaint was barred by the statute of limitations and also that the ERISA claims were insufficient as a matter of law.

In their response to the motion, the plaintiffs asserted that their first claim actually stated three independent claims under ERISA: a claim for breach of fiduciary duty; a claim for knowing participation in a breach of fiduciary duty; and a claim for non-fiduciary breach of actuarial duties. They stood by their remaining claims.

In its order granting the motion to dismiss, the district court determined that the ERISA claims were insufficient as a matter of law. The court also held that the pendent state claim was barred by the applicable California limitation period. It dismissed the PBGC's claim as derivative. The plaintiffs did not seek leave to amend their complaint, and this appeal followed.[2]

DISCUSSION

A. Claim for Breach of Fiduciary Duty

An ERISA fiduciary includes anyone who exercises discretionary authority over the plan's management, anyone who exercises authority over the management of its assets, and anyone having discretionary authority or responsibility in the plan's administration. 29 U.S.C. § 1002(21)(A);[3] *Credit*

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[2] The plaintiffs have not appealed dismissal of their ERISA claims for "unlawful party-in-interest transactions."

[3] 29 U.S.C. § 1002(21)(A) provides in relevant part:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii)

Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987). A party "rendering professional services to a plan is not a fiduciary so long as he does not exercise any authority over the plan 'in a manner other than by usual professional functions.'" *Nieto v. Ecker*, 845 F.2d 868, 870 (9th Cir. 1988), quoting *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988).

The district court held that the complaint failed to state a claim for breach of fiduciary duty because nothing in the complaint indicated that Hewitt had done anything other than render actuarial services to the plan. Further, nothing in the complaint indicated that Hewitt exercised control or authority over plan assets. Although the plaintiffs allege that Hewitt acted negligently, fraudulently, and reprehensibly as an actuary, no inference can be made from the complaint that Hewitt acted in any capacity other than as an actuary.

Although the courts have recognized the possibility that professional service providers can be liable as ERISA fiduciaries, they consistently have found attempts to assert liability on that basis unavailing. For example, the *Nieto* court affirmed the district court's dismissal of a claim against an attorney who allegedly rendered services to an ERISA plan in an improper and fraudulent manner. Because the complaint did not allege that the attorney had authority over plan assets, the court rejected the argument that he was an ERISA fiduciary, even though his dishonesty may have led to the dissipation of plan assets. 845 F.2d at 870-71; *see also Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535-38 (7th Cir. 1991)

> he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of the plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(actuary was not fiduciary where there was no allegation that it had "actual decision-making power"); *Yeseta v. Baima*, 837 F.2d 380, 384-85 (9th Cir. 1988) (attorney and accountant who did not exercise actual control over management of plan not fiduciaries); 29 C.F.R. § 2509, 75-5 (1990) (actuary not fiduciary solely by virtue of rendering services to plan).

In their brief, the plaintiffs rely primarily on *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984). In *Monson*, the court upheld a district court's finding of liability for breach of fiduciary duties against the general manager of a plan sponsor. The district court noted that the manager had worked on relevant amendments to the plan, had consulted on the plan's behalf with independent experts regarding plan investments, had authority to issue press releases on behalf of the plan, and was responsible for informing employees about the plan. *Id.*

Monson is easily distinguishable from this case. Unlike the general manager in *Monson*, Hewitt was an independent actuary, not part of the plan sponsor's control group. Also, unlike the facts in *Monson*, the plaintiffs' allegations do not indicate that Hewitt had any control over the plan's operation or administration.

We conclude the district court correctly held that the plaintiffs' allegations failed to state a claim for breach of fiduciary duty under ERISA.

B. Claim for Knowing Participation in Breach of Fiduciary Duty

The plaintiffs argue that even if Hewitt is not a fiduciary, it still may be liable under ERISA if it knowingly participated in another's breach of fiduciary duty.

ERISA provides that any person who is a fiduciary to a plan who breaches any duty imposed by the statute is personally liable to the plan. 29 U.S.C. § 1109(a).[4] ERISA's civil enforcement section provides that a civil action may be brought by the Secretary or by a plan participant, beneficiary, or fiduciary for relief under section 1109. 29 U.S.C. § 1132(a)(2).[5]

In *Nieto*, we held that the plain language of section 1109(a) "limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable under that section." 845 F.2d at 871. We rejected the argument that a non-fiduciary could be liable under this section for knowing participation in a breach of fiduciary duty. *Id.*[6]

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[4] Section 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

[5] Section 1132 provides in relevant part:

> (a) A civil action may be brought--
>
> ...
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title ...

[6] We subsequently followed *Nieto* in *Call v. Sumitomo Bank*, 881 F.2d at 634-35.

Plaintiffs contend that we can and should overrule *Nieto* because Congress' enactment of the Omnibus Revenue Reconciliation Act of 1989 and its addition of a new enforcement provision to ERISA, 29 U.S.C. § 1132(l),[7] clarified Congress' intent to permit suits for knowing participation in a breach of fiduciary duty. Section 1132(l) gives the Secretary of Labor the power to assess a civil penalty against fiduciaries or other persons in certain amounts based upon any "knowing participation" in such a breach of fiduciary duty. The plaintiffs note that section 1132(l) refers to judicial proceedings brought by the Secretary under sections 1132(a)(2) or (a)(5). Section 1132(a)(2) in turn allows both the Secretary and plan participants to bring civil actions. The plaintiffs therefore conclude that because Congress in section 1132(l) gave the Secretary the ability to bring an action against non-fiduciary assistants under 1132(a)(2), it implicitly gave plan participants the same ability.

We reject this argument. The plain language of section 1132(l) applies to the Secretary only, not to plan participants.

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[7] Section 1132(l) provides in relevant part:

> (1) In the case of --
> (A) any breach of fiduciary responsibility ... or
> (B) any knowing participation in such a breach or violation by any other person,
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
> (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach ...
> (A) pursuant to any settlement agreement with the Secretary, or
> (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

"[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1984), quoting *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979); *see also Nieto*, 845 F.2d at 872.

In drafting the ERISA amendments in 1989, Congress considered but rejected an amendment to overrule our decision in *Nieto*. H.R. Rep. No. 101-247, 101st Cong., 1st Sess. 77-78, *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 1969-70. We decline to do what Congress has refused to do.

C. Claim for Non-Fiduciary Violations of ERISA

The plaintiffs also argue that their first cause of action states a claim under 29 U.S.C. § 1132(a)(3), which provides that plan participants may seek equitable relief to redress violations of ERISA.[8] By this claim, the plaintiffs sought a recovery of money from Hewitt for its alleged improper acts.

The only way the district court could fashion an equitable remedy under ERISA to provide a monetary recovery for the plaintiffs against Hewitt would be to order restitution. The district court dismissed this claim, however, because the plaintiffs had not alleged that Hewitt received anything other than its compensation for actuarial services. We agree with

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[8] Section 1132(a)(3) provides in relevant part:

> A civil action may be brought --
> ...
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

this analysis. Restitution was not available because unjust enrichment to support the plaintiffs' claim was not alleged.

Moreover, restitution requires that there be a direct link between the loss complained of and the recovery sought. *See Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 949-50 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976) (to make out a claim for restitution "it is usually necessary for the plaintiff to show that he conferred the benefit"). Here, no such link exists. The plaintiffs allege that Hewitt was paid by Kaiser, not from assets of the plan. It is not possible, therefore, to frame a claim for restitution in terms of the recovery of plan assets wrongfully obtained by Hewitt. *See United States ex rel. Youngstown Welding and Eng'g Co. v. Travelers Indem. Co.*, 802 F.2d 1164, 1169 (9th Cir. 1986) (party who is not source of unjust enrichment is not entitled to restitution under Arizona law).

The plaintiffs argue that to the extent Kaiser was paying Hewitt, it was doing so as remuneration for breach of Hewitt's statutory duty and that all payments received by Hewitt were thus "unjust enrichment." The plaintiffs, however, have provided no authority that supports this theory. Moreover, to accept the plaintiffs' argument would be to obliterate the already blurry distinction between restitution and damages at law. Give that ERISA explicitly limits claims pursuant to subsection (a)(3) to claims for equitable relief, such an expansion would appear contrary to the spirit of the statute. *See Nieto*, 845 F.2d at 873 (permitting recovery of damages under subsection (a)(3) would render subsection (a)(2) superfluous, "a result contrary to a fundamental cannon of statutory construction").[9]

[9] Even under this somewhat circuitous theory of unjust enrichment, the plaintiffs failed to allege Hewitt obtained anything from the plan.

We conclude that the district court did not err in dismissing the plaintiffs' non-fiduciary ERISA claim for restitution.

D. Pendent California Professional Malpractice Claim

The district court dismissed the plaintiffs' pendent professional negligence claim as time barred. The parties agree that California Code of Civil Procedure § 339(1), the two-year statute of limitations for professional malpractice, governs this pendent claim. The dispute is over when the claim accrued.

In California, the statute of limitations for a professional malpractice claim begins to run upon the occurrence of the last fact essential to the cause of action. "The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive the plaintiffs of a cause of action before they are aware that they have been injured." *Leaf v. City of San Mateo*, 104 Cal.App.3d 398, 406, 163 Cal.Rptr. 711, 715 (1980). This is generally known as the "discovery rule."

Where the "discovery rule" applies, "the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 568, 661 (1988) (citation and footnote omitted). California courts have applied the discovery rule to professional malpractice cases. *See Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 98 Cal.Rptr. 837 (1971) (attorney malpractice); *Moonie v. Lynch*, 256 Cal.App.2d 361, 64 Cal.Rptr. 55 (1967) (accountant malpractice).

Hewitt does not contest that the discovery rule applies here. Rather it argues that the plaintiffs should have discovered

Hewitt's alleged wrongs in 1986, when the plan failed.[10] It argues that the plaintiffs had access to plan reports that would have alerted them to any actuarial improprieties. It asserts that certainly when the plan failed, the plaintiffs were on notice and should have obtained the reports that would have alerted them to the funding problems.

Hewitt's argument fails under California law. "[T]he question of when there has been a belated discovery of the cause of action, especially in malpractice cases, is essentially a question of fact...[and] [i]t is only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law." *Brown v. Bleiberg*, 32 Cal.3d 426, 436, 186 Cal.Rptr. 228, 233 (1982).

In *Baright v. Willis*, 151 Cal.App.3d 303, 198 Cal.Rptr. 510 (1984), the court refused to sustain a demurrer in a professional negligence case where the plaintiff's complaint did not show on its face that "in the exercise of due diligence plaintiff should have earlier discovered respondent's alleged negligence and failed to do so." 151 Cal.App.3d at 311, 191 Cal.Rptr. at 514-15. A demurrer on statute of limitations grounds is improper "where the complaint merely shows that the action may have been barred. It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred." 151 Cal.App.3d, at 311, 191 Cal.Rptr. at 514,

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[10] The plaintiffs' complaint alleged that "[i]n October, 1986, the PBGC determined the PLAN to be severely underfunded and incapable of paying its liabilities, including the full early retirement monthly pension benefits owed to the plaintiffs and other similarly situated PLAN participants and beneficiaries."

Even if, as the plaintiffs now claim, the PBGC made the determination in February 1987, the result is the same--the complaint was not filed until December 1989, two years and nine months after the later date.

quoting *Vassere v. Joerger*, 10 Cal.2d 689, 693, 76 P.2d 656, 653 [*sic*] (1938).

In the present case, the complaint does not show on its face that the plaintiffs should have discovered Hewitt's alleged negligence when the PBGC determined the plan to be severely underfunded and incapable of paying its liabilities. The PBGC may terminate a plan for a variety of reasons not premised on wrongdoing by either the plan fiduciaries or the plan's enrolled actuary. *See* 29 U.S.C. § 1342(a). *See also Pension Benefit Guaranty Corp. v. LTV Corp.*, __ U.S. __, 110 S.Ct. 2668, 2672-73 (1990) (plan sponsor entering bankruptcy). Reasonable minds can draw more than one conclusion from the circumstance of underfunding.

Thus, we reverse the district court's dismissal of the pendent state claim as barred by the applicable statute of limitations. The complaint does not show on its face that the plaintiffs were placed on a discovery inquiry as to Hewitt's alleged professional malpractice more than two years before the complaint was filed. On remand, the district court has discretion to allow the plaintiffs to pursue the pendent claim or to dismiss it. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

CONCLUSION

The district court's dismissal of the ERISA-based claims is affirmed. The district court's dismissal of the pendent state claim is reversed and remanded.

AFFIRMED in part, **REVERSED** in part and **REMANDED.**

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees,

No. 90-1627

D.C. No. C-89-4475-MHP

ORDER

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*

The Secretary of Labor's Motion for Leave to File its Brief Amicus Curiae is granted. The brief, received by the clerk on November 18, 1991, is ordered filed.

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* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees,

No. 90-1627

D.C. No. C-89-4475-MHP

ORDER

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Norris and Thompson have voted to reject the suggestion for rehearing en banc, and Judge King has so recommended.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35 (b).

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* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ,

Plaintiffs,

v.

No. C-89-4475-MHP

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants.
_____________________________/

ORDER

Plaintiffs bring this action for declaratory, injunctive and monetary relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. and include a pendent state claim. The parties are now before the court on defendant Hewitt's motions dismiss the complaint [*sic*] and to dismiss a cross-claim under Federal Rule of Civil Procedure 12(b)(6).

BACKGROUND

Plaintiffs, former salaried employees of the Kaiser Steel Corporation, filed this action on December 18, 1989, alleging that Hewitt Associates ("Hewitt") had violated certain provisions of ERISA and California law while acting as actuary

for the Kaiser Steel Retirement Plan ("Plan"). The court assumes the following allegations to be true, as it must for purposes of Hewitt's motion to dismiss.

Beginning in 1980, Kaiser radically restructured its business, ultimately curtailing and virtually eliminating its steel-making operations. Cplt. at 10. As a consequence of that curtailment, the number of employees who took early retirement, and were thus eligible for early retirement benefits, rose sharply. The early retirements, and related events resulted in significantly higher funding costs for the Plan which were not reflected in the actuarial assumptions employed by Hewitt.

Hewitt acted as actuary for the Plan from the Plan's inception in 1977 until the Plan was terminated in 1986. *Id.* at 3. Because of Hewitt's failure to alter its actuarial assumptions, Kaiser made substantially lower payments than necessary into the Plan. *Id.* at 4. Hewitt never disclosed those funding inadequacies in ERISA-prescribed documents or otherwise. *Id.* Hewitt also never disclosed that it was performing actuarial services for Kaiser at the same time as it performed these services for the Plan. *Id.*

In October 1986, the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation created under ERISA to administer the pension plan termination program, terminated the Plan after determining that the Plan was severely under-funded and incapable of paying its liabilities. *Id.* at 4-5. The PBGC is now the statutory trustee of the Plan. The retirement benefits of each of the plaintiffs and those similarly situated are considerably less under PBGC administration than those benefits to which they were entitled before the Plan was terminated. *Id.* at 5.

The termination of the Plan has resulted in several lawsuits by Plan members, three of which have been instituted before this Court. In the present action, plaintiffs allege that Hewitt's actions were a breach of "professional duties" to the Plan created by ERISA, related regulations, and IRS regulations; that they constituted party-in-interest transactions in violation of ERISA section 406(a)(1), codified at 29 U.S.C. section 1106(a)(1); and that they constituted common law negligence. The PBGC and the Plan were named as defendants along with Hewitt.

Defendant Hewitt now enters motions for dismissal of the complaint and of the cross-claim of the PBGC.[1]

LEGAL STANDARD

A motion to dismiss will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.), *cert. denied sub. nom. Wyoming Community Dev. Auth. v. Durning*, __ U.S. __, 108 S.Ct. 330 (1987).

DISCUSSION

Hewitt's motion to dismiss is based on several grounds. Defendant contends that the first and second counts of plaintiffs' complaint fail to state a claim upon which relief can be granted under ERISA. For count one, Hewitt maintains that no private right of action exists under ERISA for a so-called "breach of professional duties." For count two, Hewitt argues that plaintiffs have not properly alleged an unlawful party-in-

interest transaction. Finally, Hewitt argues that the statute of limitations bars all claims. The court will take up each of these contentions in turn.[2]

I. The Viability of the ERISA Claim for Breach of Fidu iary Duty

The complaint includes no explicit count for breach of fiduciary duty, but the plaintiffs ask the court to read such a claim into it. They argue that count one can be construed as stating a valid claim for breach of fiduciary duty against Hewitt. Such a claim can only survive if Hewitt, the Plan actuary, is deemed a plan fiduciary. For present purposes, a plan fiduciary is one who:

> exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or one who] has any discretionary authority or discretionary responsibility in the administration of such plan.
> (29 U.S.C. § 1002(21)(A).)

Absent a showing that they have moved beyond the realm of their ordinary duties, actuaries, attorneys and accountants are not plan fiduciaries. *Yeseta v. Baima*, 837 F.2d 380, 385 & n. 2 (9th Cir. 1988) (finding attorney and accountant not to be fiduciaries where they exercised purely ministerial duties); 29 C.F.R. § 2509.75-5 (1986) (actuary not fiduciary unless exercised control over management of plan or plan's assets).

Plaintiffs argue that if Hewitt controlled or had the authority to control the setting of actuarial assumptions, then Hewitt was a fiduciary. They maintain that the complaint's allegations that Hewitt was responsible for employing and changing actuarial assumptions are sufficient to make Hewitt a fiduciary. That argument must fail. Actuaries are statutorily bounds to employ actuarial assumptions in preparing statements for benefit plan

annual reports. 29 U.S.C. § 1023(d)(8). Moreover, actuaries must re-evaluate and possibly change assumptions on at least an annual basis, since their written statements are required yearly. The performance of these statutorily-prescribed duties does not render actuaries fiduciaries.

Plaintiffs cite no cases finding an actuary to be a fiduciary. The authority that they do cite is either too general or simply inapposite. In *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980), the defendant found to be a fiduciary was a company which administered employee benefit plans. The court found that the company provided a range of administrative and management services to the benefit plans at issue, including adjudicating medical claims, supervising a dental clinic and supervising the establishment of recordkeeping systems. "In each instance [the company] apparently possessed broad latitude in making awards, setting priorities, and performing other administrative tasks . . . . [The company] exercised far more than ministerial powers." *Id.* at 747. In the present case, by contrast, plaintiffs nowhere allege that Hewitt's role expanded beyond that of a typical actuary.[3] The other case plaintiffs principally rely upon for their argument that actuaries may be fiduciaries is also distinct from the present case. *Brock v. Self*, 32 F. Supp. 1509, 1520 (W.D. La. 1986) (pension plan servicing company, its executive officer and an employee all found to be fiduciaries because they rendered investment advice for a fee and exercised discretionary authority).

This court's decision that Hewitt's acts do not render it a fiduciary is supported by the few reported decisions directly on point. In *Associates in Adolescent Psychiatry v. Home Life Ins. Co.*, 729 F. Supp. 1162 (N.D. Ill. 1989), the court found that actuarial defendants who did nothing more than render professional services were not fiduciaries. Similarly, in the case at bar, taking all the complaints allegations as true, Hewitt did nothing more than negligently perform actuarial services.[4] In *Pappas v. Buck*, 1989 U.S. Dist. LEXIS 14767, (N.D. Ill.

Dec. 11, 1989), the defendant actuaries were accused of using the wrong yearly interest rate in computing their actuarial assumptions. The court stated:

> Defendants are accused only of giving faulty advice and professional services of a kind that do not involve exercising authority over the plan's assets . . . . We do not think that the rendering of professional actuarial service alone can render one an ERISA fiduciary. *See, e.g., Painters of Philadelphia Dist. Council v. Price Waterhouse*, 879 F.2d 1146, 1149-50 (3d Cir. 1989) [public accountant's audit of ERISA fund did not render accountant a fiduciary].

II. Viability of Claim for Knowing Participation in Breach of Fiduciary Duty

Plaintiffs also maintain that count one can be construed as alleging that Hewitt knowingly participated in breaches of fiduciary duties by Plan fiduciaries. Plaintiffs concede that the Ninth Circuit has explicitly ruled that no right of action exists under ERISA for damages against a non-fiduciary. *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1988) (reaffirmed in *Call v. Sumitomo Bank*, 881 F.2d 626, 634 (9th Cir. 1989)). However, they argue that passage of the Omnibus Revenue Reconciliation Act in 1989 clarified Congress' intent to allow such actions. They contend that the amendments to ERISA codified at 29 U.S.C. section 1132(l), which require the Secretary of Labor to levy civil penalties against those who knowingly participate in breaches of fiduciary duty, demonstrate that Congress intended such individuals to be liable under 29 U.S.C. section 1109 all along.

This court will not engage in creative rewriting of the statute or of Ninth Circuit law by which it remains bound. The Ninth Circuit has clearly rejected aider and abettor or other non-fiduciary liability under section 1109.

III. Viability of Claim for Breach of Actuarial Duties

Plaintiffs also allege in their first cause of action that Hewitt breached professional duties imposed upon it by ERISA statutes and regulations and by Internal Revenue Service regulations.[5]

Plaintiffs concede, as they must, that their only viable avenue for redress of ERISA violations committed by a non-fiduciary is through a claim for equitable relief under 29 U.S.C. section 1132(a)(3).[6] *Nieto*, 845 F.2d at 874. Plaintiffs' prayer for relief asks for an order that Hewitt "make good to the Plan, plaintiffs and their class any and all losses to the Plan resulting from its breaches of ERISA." Cplt. at 12. Plaintiffs classify this as a prayer for restitutionary relief.[7] Opp. Mem. at 23.

Few reported cases have considered the availability of restitutionary relief under section 1132(a)(3). The parties have cited none. In the only reported appellate case on point, *United States Steel Mining Co. v. District 17 United Mine Workers*, 897 F.2d 149 (4th Cir. 1990), a company and its pension fund sought to recover benefits wrongly paid to employees in compliance with a state court injunction which was later invalidated. The defendants were the state court judge, the employee union and its members. The Fourth Circuit ruled that it was inappropriate for a federal court to grant relief under the circumstances because: 1) the damages sought were extra-contractual, in contradiction of the dictates of *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) and 2) the state court which issued the injunction was the best forum for relief. *United States Steel Mining Co.*, 897 F.2d at 153. In its denial of restitutionary relief for the case before it, the court rendered no opinion on the availability of such relief under section 1132(a)(3) in general.

Three district court cases have considered the issue before the court. In *Bartz v. Carter*, 709 F. Supp. 827 (N.D. Ill. 1989) the plaintiffs sought restitution from trustees who allegedly

converted a profit sharing plan into an employee stock ownership plan and gained control of the company, resulting in a substantial reduction in the value of plan assets. The court denied a motion to dismiss the claim, ruling that it was properly brought under section 1132(a)(3)(B)(ii). Although this court disagrees and considers such a claim properly brought under section 1132(a)(2) instead, the *Bartz* decision still serves as an example of judicial recognition of the restitutionary remedy under section 1132.

Further recognition of the remedy occurred in *Rochetti v. American Fed'n. of Musicians' and Employers' Pension Welfare Fund*, 1987 W.L. 12767 (N.D. Ill. Aug. 13, 1987) and *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980). In *Rochetti* musicians sought to recover payments made on their behalf into a benefits fund. They alleged that the payments violated the Labor Management Relations Act. The court recognized that restitution was an equitable remedy contemplated by section 1132(a)(3), but denied it to the plaintiffs because they did not seek to redress violations of ERISA.

In *Bittner*, the plaintiff alleged that he had been dismissed in retaliation for exercising his right to ERISA benefits. He sought back pay and reinstatement. In denying the defendant's motion to dismiss, the court observed that section 1132(a)(3) authorized equitable relief and stated, "[c]hief among the equitable remedies is the remedy of restitution." *Id.* at 536.

The above cases provide sufficient support for this court to grant restitutionary relief under section 1132(a)(3), in appropriate circumstances. However, the case at bar does not present such circumstances. Restitutionary relief must be predicated on some unjust enrichment. "[R]estitution is generally awarded when the defendant has gained a benefit that it would be unjust for him to keep . . . ." Dobbs *Remedies*, § 4.1 at 224 (West 1978). In the case at bar there are no

allegations that Hewitt's purported violations have resulted in any benefit beyond its normal compensation as an actuary.

That is not to say that no protections are available against actuaries who violate ERISA without profiting from their malfeasance. Timely injunctive relief is available under sections 1132(a)(3) and (a)(5). Moreover, relief is also available through the Joint Board for Enrollment of Actuaries who may suspend or terminate an offending actuary's right to provide services to ERISA plans. 29 U.S.C. § 1242(b).

Because no claim exists on the alleged facts for breach of fiduciary duty, for knowing participation in breach of fiduciary duty, or for breach of "professional duties," the first cause of action in this case is dismissed.

IV. Viability of Claim for Unlawful Party-In-Interest Transactions

As a general rule, a claim under section 1132(a)(3) can be made for violations of the prohibited transaction sections of ERISA. *Nieto*, 845 F.2d at 873-74. Plaintiffs allege such a violation as follows in their second cause of action:

> Because it breached its obligations, duties and responsibilities to the PLAN, failed to exercise due care, skill, prudence and diligence in the performance of its duties, and provided services to Kaiser in conflict to its obligations to the PLAN, HEWITT's compensation was not reasonable. Accordingly, by receiving compensation for the services it provided PLAN, HEWITT committed a prohibited transaction in violation of ERISA § 408 [sic] [406 intended].
> (Cplt. para. 40.)

Plaintiffs attempt to bootstrap a right to relief for commission of prohibited transactions based on a separate claim for violation of actuarial duties. The second cause of action is

redundant. The violation of actuarial duties was alleged in count one. That violation cannot fairly be held to have rendered Hewitt's acceptance of otherwise reasonable compensation an additional actionable claim. Under the plaintiffs' scheme, any time a service provider was liable for an ERISA violation, both the provider and otherwise blameless plan fiduciaries would be liable for engaging in a prohibited transaction if the fiduciaries paid the negligent provider. Nothing in ERISA suggests such far-flung remedies.

Plaintiffs' reliance on *Nieto* is unavailing. The attorney defendant in *Nieto* allegedly was paid for services he never rendered, as opposed to being paid for services negligently rendered. *It*. at 870. The excess compensation was thus the basis for a valid claim of engaging in a prohibited transaction.

The plaintiffs' prohibited transaction claim is flawed for an additional reason. A prohibited transaction requires wrongful receipt of plan assets. 29 U.S.C. § 1106. The complaint alleges that Hewitt was paid for its services by Kaiser Steel, not by the Plan. Cplt. at para. 9. Thus, there was no prohibited transaction between Hewitt and the Plan within the meaning of section 1106. Plaintiffs' attempt at oral argument to tie the Plan to the source of funds for Hewitt's payment was nothing more than conjecture. Plaintiffs have failed to state a claim under ERISA for count two of the complaint and the count is dismissed.

V. Viability of Pendent Professional Negligence Claim

Plaintiffs concede that their third cause of action for professional negligence under state law is governed by the two-year statute of limitations of California Code of Civil Procedure section 339.1. Therefore, only those wrongful acts occurring in the two years prior to the filing of the suit on December 18, 1989 are actionable, unless tolling applies.

Plaintiffs contend that the statute did not begin to run until after the commencement of discovery in the related case of *Mertens v. Kaiser Steel Retirement Plan*, No. C-88-3587-MHP (N.D. Cal), which was filed in September 1988. They maintain that until then there was no "notice or information of circumstances to put a reasonable person on inquiry," *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103 91988). They also cite other bases for tolling. *April Enterprises v. KTTV*, 147 Cal. App. 3d 805, 831 (1983) (statute tolled where the injury or the act causing injury has been difficult to discover); *Bedolla v. Logan & Frazer*, 52 Cal. App. 3d 118, 125 (1975) (statute tolled until wrongful acts are discovered or with reasonable diligence could have been discovered).

The defendant argues that the statute began running at the time when the PBGC terminated the Plan after determining that it was "severely underfunded and incapable of paying its liabilities." Cplt. para. 19. They maintain that, since the PBGC made a determination of underfunding and terminated the Plan in October 1986, the plaintiffs then knew or should have known of the Plan's funding inadequacies. They contend that, in any event, once plaintiffs began receiving reduced benefits checks they were on notice of the need to discover the facts underlying the Plan's termination.

The court agrees with defendant. The allegations in the complaint regarding termination of the Plan in October 1986 due to underfunding establish that the statutory period commenced at that time. Since the action was not filed until December 1989, the negligence claim is barred.

CONCLUSION

For the foregoing reasons, the court GRANTS defendant Hewitt's motion for dismissal of the complaint in its entirety. All federal claims in the complaint are DISMISSED for failure to state claims upon which relief may be granted. The statute of limitations has run on the pendent law state claim and it,

too, is DISMISSED. The court also GRANTS defendant Hewitt's motion for dismissal of the PBGC's cross-claim. Since the cross-claim is derivative of the fatally defective complaint, the cross-claim is DISMISSED.

Although defendant Hewitt's motion was not brought on behalf of the other two defendants, since no distinct allegations were directed against them, the PBGC and the Plan are also DISMISSED from the action.

IT IS SO ORDERED.

Dated: August 9, 1990

/s/
MARILYN HALL PATEL
United States District Judge

1. In reference to the motion to dismiss the cross-claim of the PBGC, Hewitt argues, and the PBGC concedes, that the cross-claim must rise or fall with the complaint. Hewitt's arguments on its motion to dismiss are thus aimed at both the complaint and the cross-claim. Rather than file a memorandum rebutting Hewitt's arguments, the PBGC has joined in the plaintiffs' opposition to Hewitt's motion.

2. The resolution of the motion on substantive grounds renders it unnecessary for the court to consider the statute of limitations arguments.

3. Plaintiffs do allege, at paragraph 23 of the complaint, that "[i]nformation regarding the repeated meetings and other occasions when [Hewitt] . . . exercised defendant's fiduciary duties regarding [the Plan], or could and should have exercised those duties, is particularly within the knowledge of Hewitt." Complaint at para. 23. Plaintiffs apparently believe that they are thus freed from any responsibility to make more specific allegations of misconduct by Hewitt, pending discovery. However, the allegation that Hewitt knows more about what happened in meetings related to its actuarial duties than do the plaintiffs adds nothing. The court will not accept the notion that, because the plaintiffs do not know the specifics of Hewitt's activities, one can assume that those activities give rise to a fiduciary relationship.

4. Plaintiffs argue that the complaint also alleges that Hewitt acted in collusion with Kaiser. They cite no specific paragraph for this allegation and the court finds it nowhere. The closest allegation would appear to be paragraph 32 where plaintiffs allege that Hewitt either delegated the responsibility for selecting the Plan's actuarial assumptions to Kaiser or allowed Kaiser to do so "in order not to jeopardize its lucrative professional relationship with Kaiser." Cplt. at para. 32. From this allegation one cannot reasonably infer collusion with Kaiser, one can at most infer profit maximizing or perhaps greed on Hewitt's part.

5. The statutory duties referred to are set out at 29 U.S.C. sections 1023(a)(4)(B); 1023(d)(8), (10) and (13); and 1082(c)(3). The pertinent ERISA regulations, established by the Joint Board for Enrollment of Actuaries pursuant to 29 U.S.C. section 1242, are set out in 29 C.F.R. section 901.2. The I.R.S. regulations at issue are codified at 31 C.F.R. section 10.0 et seq.

6. On this point, the parties strive mightily against nonexistent targets. The defendant employs the factors of *Cort v. Ash*, 422 U.S. 66 (1975), to argue at length concerning the unavailability under ERISA of a private cause of action for damages against a non-fiduciary. Plaintiffs' belated concession renders that argument unnecessary. More curiously, the plaintiffs also apply *Cort v. Ash* to argue in favor of a cause of action already granted to them by statute.

7. Since the Plan was terminated long ago, and with it Hewitt's role as plan actuary, obviously injunctive relief is irrelevant.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ,

Plaintiffs,

v.

No. C-89-4475-MHP

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants.

ORDER

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed herein dismissing all claims,

IT IS ORDERED AND ADJUDGED that plaintiffs' complaint is DISMISSED as to all defendants, the Pension Benefit Guaranty Corporation's cross-claim is DISMISSED and this action is DISMISSED in its entirety.

IT IS SO ORDERED.

Dated: August 9, 1990

/s/
MARILYN HALL PATEL
United States District Judge

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No. 91-1671

In The

Supreme Court of the United States

October Term, 1991

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 91-1671

In The

Supreme Court of the United States

October Term, 1991

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Hewitt Associates ("Hewitt"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case. That decision is reported at 948 F.2d 607 (1991) and is reprinted in Petitioners' Appendix ("PA"). (PA1.)

STATEMENT OF THE CASE[1]

This petition arises from the third in a series of actions filed by former Kaiser Steel Corporation ("Kaiser") employees. All of these cases have sought to recover benefits lost when the Pension Benefit Guaranty Corporation ("PBGC") terminated the Kaiser Steel Retirement Plan ("the Plan") in February of 1987, after Kaiser declared bankruptcy.

In an effort to discover a "deep pocket," former Kaiser employees have searched for additional parties to sue. They cannot sue Kaiser because it is bankrupt. They unsuccessfully attempted to sue various fiduciary trustees and administrators of the Plan, alleging that their failure to purchase individual annuities to fund each pension was the cause of the Plan's demise. *Horan v. Kaiser Steel Retirement Plan,* 947 F.2d 1412 (9th Cir. 1991). A separate action currently pending in the district court, filed by the same former Kaiser employees who are Petitioners here, claims that various trustees and administrators breached their fiduciary duties by failing to ensure that the Plan was adequately funded. *Mertens v. Black,* No. CV 88-3587-MHP (N.D. Cal. 1989).

Subsequent to that action, Petitioners brought this case against Hewitt, an employee benefit consulting firm that performed actuarial services for Kaiser during the early 1980s. Petitioners allege that the Plan's financial

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[1] Petitioners' Statement of the Case omits a description of related litigation and of portions of their Complaint in this action. Accordingly, Hewitt includes a brief Statement of the Case.

woes were caused, not by the demise of Kaiser or the actions of the trustees and administrators, but by Hewitt's failure to comply with its "professional obligations" under ERISA.[2] The district court dismissed these ERISA allegations for failure to state a claim upon which relief can be granted. The United States Court of Appeals for the Ninth Circuit affirmed that dismissal, and Petitioners filed this petition.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, there is no current, real or intolerable conflict among the circuits on the Question Presented by their petition. That question was answered in the negative by Congress when it passed the

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[2] Petitioners do not explicitly plead a cause of action for breach of fiduciary duty or knowing participation in a breach of such duty. Instead, their Complaint alleges "Breach of Professional Duties to Plan." (Respondent's Appendix ("RA") at 8.) That count asserts that Hewitt was subject to various ERISA reporting requirements (RA8-10) and that regulations of both the Joint Board of Enrolled Actuaries and the Internal Revenue Service imposed certain standards of professional conduct. (RA10-12.) Petitioners then alleged *only* that Hewitt breached these statutory and regulatory obligations by "either delegat[ing] the responsibility to Kaiser for selecting the Plan's actuarial assumptions or allow[ing] Kaiser to impose its choice of assumptions." (RA12.) It was not until Hewitt moved to dismiss the Complaint that Petitioners argued *for the first time* that their "claim for relief can and should be *construed* to support any of three different claims:" (1) breach of fiduciary duty under ERISA; (2) knowing participation in a breach of fiduciary duty under ERISA; and (3) breach of professional actuarial duties under ERISA. (PA4.)

Omnibus Budget Reconciliation Act of 1989 ("OBRA") without a provision – originally proposed by the drafters – explicitly creating a damage action against non-fiduciaries. *See* H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). Both the absence of this explicit provision as well as the specific terms of OBRA as enacted disclose a Congressional intent to preclude such actions. Not surprisingly, since the enactment of OBRA, no federal court of appeals has permitted any party to pursue such claims; indeed the two circuits which have considered the issue have expressly rejected such claims. (*See infra* note 3 and accompanying text.)

In addition, none of the purportedly conflicting cases cited by Petitioner consider the impact of this Court's controlling pronouncements. *See, e.g., Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 146 (1985) (ERISA's "carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly"). And, the cases cited by Petitioner are all dated, factually distinguishable determinations which failed to analyze ERISA, its legislative history or decisions of other courts.

I. THERE IS NO CURRENT CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED BECAUSE NO FEDERAL COURT OF APPEALS HAS ALLOWED A PRIVATE DAMAGES ACTION AGAINST NON-FIDUCIARIES SINCE CONGRESS ENACTED OBRA.

At the time it passed OBRA in 1989, Congress considered and rejected a proposed amendment to ERISA that

would have specifically provided a private cause of action for damages against non-fiduciaries who knowingly participate in a breach of fiduciary duty. *See* H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). In addition, there is nothing in OBRA as enacted that indicates a contrary Congressional intent.

All of the cases cited by Petitioner which purportedly conflict with the ruling below were decided *before* Congress enacted OBRA. Since that time, only the Ninth and the Eleventh Circuits have considered the issue of whether ERISA provides a damage action against non-fiduciaries, and both courts agree that no such cause of action exists.[3] Accordingly, there is no current conflict among the courts of appeal on this issue.

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[3] *Mertens v. Hewitt Assocs.,* 948 F.2d 607 (9th Cir. 1991); *Useden v. Acker,* 947 F.2d 1563 (11th Cir. 1991). In *Useden,* a profit sharing plan trustee filed suit against a bank which made a loan to the plan and the plan's former lawyers alleging liability based upon alternate theories of breach of fiduciary duties or knowing participation in a fiduciary breach by a non-fiduciary. *Id.* at 1565. The Eleventh Circuit affirmed the district court's summary judgment on the ground that a non-fiduciary cannot be held liable for participating in a fiduciary breach. *Id.* at 1582. *Accord Albert Einstein Medical Care Found. v. National Benefit Fund,* No. 89-5931, 1991 WL 114614 (E.D. Pa. June 21, 1991); *Framingham Union Hosp., Inc. v. Travelers Ins. Co.,* 744 F. Supp. 29 (D. Mass. 1990). *See also Consolidated Beef Indus. v. New York Life Ins.,* 949 F.2d 960, 965 (8th Cir. 1991) ("[t]his court expresses no opinion on the validity of non-fiduciary liability because even under the standards in *Freund,* CBI has not proven NYL is liable as a non-fiduciary"), *cert. denied,* 60 U.S.L.W. 3617 (1992); *Pappas v. Buck Consultants, Inc.,* 923 F.2d

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Petitioners' assertion that OBRA endorses a private cause of action against non-fiduciaries is wrong for several reasons. Most significantly, the argument ignores Congress' express rejection of an amendment to ERISA which would have explicitly created such an action. The proposed amendment provided:

> Any person who participates knowingly in, or knowingly undertakes to conceal, an act or omission of a fiduciary with respect to a plan, knowing such act or omission is a breach of fiduciary responsibility to such plan, shall be personally liable to the plan for such breach of fiduciary responsibility in the same manner and to the same extent as if such person were a fiduciary committing such breach.

H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). OBRA's legislative history reveals that this section was drafted specifically to overrule *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), the decision upon which the Ninth Circuit's ruling in this case was based.[4]

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531, 542 (7th Cir. 1991) (pension plan trustee's allegations of "incorrect advice" and "misleading reports" failed to state cause of action against actuary for knowing participation in fiduciary breach).

[4] OBRA's legislative history states:

> [A] divided panel of the Ninth Circuit in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) held that the absence of specific language in ERISA creating such a cause of action precluded the Court from ordering

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The deletion of this amendment from the bill enacted into law demonstrates a Congressional intent to prohibit such actions. *See Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988) ("[o]nce Congress was sufficiently aware of [an issue] – as evidenced by its adoption of [a limited provision on that issue] – Congress' decision to remain silent concerning [the issue] 'acknowledged and accepted the practice, rather than prohibiting it' " (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516 (1981))); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

Petitioners' argument that a private damages action against non-fiduciaries can be inferred from OBRA's amendment to ERISA's civil enforcement provisions is similarly flawed. OBRA did amend ERISA by adding Section 502(l) which permits the Secretary of Labor to assess a civil penalty – not damages – against non-fiduciaries for knowing participation in a breach of fiduciary duty. 29 U.S.C. § 1132(l). That penalty is equal to "20 percent of the applicable recovery amount" which is subsequently defined as "any amount recovered from a

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> any remedy against a non-fiduciary, except to the extent that the non-fiduciary engaged in a transaction specifically prohibited by section 406 of ERISA as a party in interest. . . . This provision . . . clarif[ies] Congressional intent to codify in ERISA the common law of trusts as it applies to employee benefit plans. The bill's language specifically adopts the familiar trust law doctrine that a knowing participant in a breach of fiduciary duty may be held jointly and severally liable for the loss sustained by a breach of trust in which the knowing participant participates.

H.R. Rep. No. 247, 101st Cong., 1st Sess. 77-78 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1970.

fiduciary or other person with respect to a breach or violation" pursuant to a settlement or "ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection [502](a)(2) or (a)(5)." 29 U.S.C. § 1132(1)(2).

There is nothing in this definition which suggests a Congressional intent to allow either the Secretary or plan participants to bring damage actions against non-fiduciaries. The fact that a civil penalty may be based upon a recovery from a "fiduciary or other person" does not indicate otherwise. Recovery by the Secretary under Section 502(a)(2) is limited to fiduciaries by the explicit language of the statute. 29 U.S.C. § 1132(a)(2). The Secretary may, however, obtain a recovery from a "fiduciary or other person" in an *equitable* action for restitution under Section 502(a)(5). 29 U.S.C. § 1132(a)(5). A penalty based upon such an *equitable* recovery from an "other person" does not mandate the existence of a damage action by the Secretary (much less by a private plaintiff) against non-fiduciaries.[5]

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[5] Petitioners improperly use Section 502(1) to create a fictional "presumption that the Secretary always had the power to institute litigation against non-fiduciaries" under separate enforcement provisions which are conspicuously silent on the subject. (Petition at 16.) As first enacted in 1974, Section 502(a)(5) authorized the Secretary of Labor to seek equitable relief against anyone, including non-fiduciaries, who violated provisions of the Act. 29 U.S.C. § 1132(a)(5). ERISA did not, however, grant authority for the Secretary to bring damage actions under the same circumstances. Yet, on the basis of their fictional presumption that the Secretary of Labor

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As this Court concluded in *Russell*, "the six carefully integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U.S. at 146. **By providing that non-fiduciaries are liable for equitable remedies (such as restitution) and for penalties, while also authorizing *damage* recoveries only against fiduciaries, Congress limited damage liability to the latter.** Thus, Petitioners have no basis for inferring a private remedy or a private right of action.[6]

II. THE PURPORTEDLY CONFLICTING CIRCUIT DECISIONS CITED BY PETITIONER FAIL TO CONSIDER THE IMPACT OF THIS COURT'S RECENT ERISA DECISIONS ON THE QUESTION PRESENTED.

All of the cases that Petitioners rely on to create an alleged conflict between the circuits either pre-date[7] or

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always had a right to seek monetary damages under ERISA Section 502(a)(5), Petitioners further infer that plan participants must also have both a remedy and therefore a right to recover damages against non-fiduciaries. This layered speculation defies law, logic and common sense.

[6] *See Cort v. Ash*, 422 U.S. 66, 78 (1975). *See also Virginia Bankshares, Inc. v. Sandberg*, 111 S.Ct. 2749, 2763 (1991) ("recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a *private remedy*" (emphasis added)).

[7] *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982).

ignore (and do not even cite)[8] this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985). Prior to *Russell,* this Court had not considered the scope of ERISA enforcement. Although the Court had generally recognized that ERISA is a "comprehensive and reticulated statute"[9] "designed to promote the interests of employees and their beneficiaries in employee benefit plans,"[10] the Court had not addressed the application of these principles to ERISA's enforcement provisions.

In *Russell,* this Court rejected the argument that a plan beneficiary had a private right of action to recover extra-contractual damages against a plan administrator for improperly processing benefit claims.[11] *Id.* at 148. In so holding, the Court emphasized that " '[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.' " *Id.* at 145 (quoting *California v. Sierra Club,* 451 U.S. 287, 297 (1981)).

[8] *Brock v. Hendershott,* 840 F.2d 339 (6th Cir. 1988); *Whitfield v. Lindemann,* 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole,* 490 U.S. 1089 (1989); *Lowen v. Tower Asset Management, Inc.,* 829 F.2d 1209 (2d Cir. 1987); *Fink v. National Savings & Trust Co.,* 772 F.2d 951 (D.C. Cir. 1985).

[9] *Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. 359, 361 (1980).

[10] *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90 (1983).

[11] Although the holding in *Russell* was limited to the recovery of extra-contractual damages against fiduciaries under Section 409(a), (*id.* at 139 n.5), the reasoning is equally applicable to the recovery of damages against non-fiduciaries under Section 502(a)(3).

After thoroughly analyzing ERISA's legislative history, the Court was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Id.* at 147. The Court concluded that ERISA did not authorize recovery of extra-contractual damages, since " '[t]he presumption that a remedy was deliberately omitted from a statue is the strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.' " *Id.* (quoting *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 97 (1981)). The Court further warned: " '[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' " *Id.* (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19 (1979)). Although overlooked by Petitioners, these principles are directly controlling in the present case.[12]

Petitioners' attempts to subvert *Russell* through references to federal common law and traditional trust principles must fail. In enacting ERISA, Congress did not intend that statute to federalize the entire common law of trusts; instead, Congress intended that trust law principles

[12] In this Court's subsequent decisions, the *Russell* principles have been repeatedly cited with approval and given deference. *See Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. 478, 485 (1990); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 53-54, 57 (1987). Thus, those decisions do not limit *Russell,* as petitioners intimate; rather, they must be read in conjunction with *Russell.*

be used by courts as a source for interpreting the trust law terms contained within ERISA.[13]

Indeed, this is exactly the manner in which this Court has used the common law of trusts. *See Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989) (in determining the appropriate standard of review for actions under § 1132(a)(1)(B), the Court noted it was guided by principles of trust law since "ERISA abounds with the language and terminology of trust law"); *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 152 n.6 (1985) (Brennan, J. concurring) ("the principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans"); *Central States v. Central Transport, Inc.,* 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility"). This Court has never used the common law of trusts to infer an entirely new cause of action not present in ERISA.

This Court has noted in *dicta* that federal courts have the power to develop a federal common law of ERISA to provide relief that is not specifically enumerated in

[13] *See, e.g.,* S. Rep. No. 127, 93d Cong., 2d Sess. 29, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4865. ("The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts"); H.R. Rep. No. 533, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (identical language); *id.* at 13, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651 ("The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans").

§ 502(a), 29 U.S.C. § 1132(a). *Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. 478, 486 (1990). However, petitioners' citation to *Ingersoll* for the notion that federal courts may infer entirely new causes of action is misplaced. In *Ingersoll,* the Court considered whether ERISA preempted an employee's state common law wrongful discharge claim. *Id.* at 481. The state law action conflicted directly with an explicit ERISA cause of action found in Section 510, 29 U.S.C. § 1140. *Id.* at 484-85. This Court did not infer a new cause of action into ERISA; it merely found that federal courts may provide relief under ERISA that is not explicitly enumerated in the text of the statute. *Id.* at 486. It would be another matter entirely for the federal courts to infer a completely new cause of action which is contrary to expressed Congressional intent. Such a result is barred by this Court's seminal decision in *Cort v. Ash,* 422 U.S. 66 (1975).[14]

[14] Under the four factor analysis set forth *Cort v. Ash,* no private damage action against non-fiduciaries should be implied here. Although two of the factors support Petitioners' claim (i.e., petitioners are members of the class for whose benefit the statute was enacted and there is no state law impediment to implying a remedy due to ERISA's broad preemptive provision), the remaining two factors require a contrary result. Neither the legislative intent nor the consistency of the legislative scheme support the inference of a private cause of action. 422 U.S. at 78. As this Court concluded in *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77 (1981), "unless this Congressional intent can be inferred from the language of the statute, the statutory structure or some other source, the essential predicate for implication of a private remedy simply does not exist." *Id.* at 94.

III. THE CASES CITED BY PETITIONER TO CREATE A CONFLICT AMONG THE CIRCUITS ARE DISTINGUISHABLE FROM THE DECISION BELOW.

Although Petitioners argue that the Ninth Circuit's ruling in this case conflicts with reported decisions from the Second, Sixth, Seventh and D.C. Courts of Appeals, they never discuss the facts or analyze the results of those cases to demonstrate that conflict.[15] A proper examination of the decisions establishes that there is, in fact, no conflict among the circuits on the Question Presented here. None of the decisions are well-considered, all pre-date OBRA and either pre-date or ignore this Court's recent ERISA decisions.

A. The Sixth Circuit

The most recent of the purportedly conflicting cases cited by Petitioner is *Brock v. Hendershott*, 840 F.2d 339

[15] Petitioners also cite *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989), although they make no explicit claim that this Fifth Circuit case conflicts with the decision below. In *Whitfield*, the Labor Department brought suit against a pension plan trustee and his attorney for violations of fiduciary duty in connection with the trustee's acceptance of over valued assets in settlement of claims by the trust against former trustees. *Id.* at 1301-02. The Fifth Circuit concluded, without any analysis, that the attorney, although not a statutory fiduciary, was "jointly liable . . . as a non-fiduciary who knowingly participated in a breach of trust." *Id.* at 1303. The case does not conflict with the decision here because the Court did not consider (and was not asked to decide) whether ERISA contemplated a damage action by *plan participants and beneficiaries* (as opposed to the Labor Department) against non-fiduciaries.

(6th Cir. 1988). In *Brock*, the Secretary of Labor brought an action against two union representatives who personally profited from the use of their union positions to influence the selection of dental programs by various locals. *Id.* at 341. The Sixth Circuit affirmed the district court's summary judgment in favor of the Secretary of Labor and directed both representatives to disgorge their profits. *Id.* at 340.

Brock does not conflict with the decision below for several reasons. First, *Brock* was filed by Secretary of Labor, not by plan participants. *Id.* Second, the action sought equitable relief in the form of restitution, not damages. *Id.* at 341. Third, defendants in *Brock* were union representatives who personally profited from their own wrongdoing, not service providers, such as Hewitt, performing statutorily mandated functions. One of the union representatives was a fiduciary, and it was "unclear" whether the other defendant also qualified as an ERISA trustee. *Id.* at 342. The Court never resolved the factual fiduciary question because it summarily concluded that a non-trustee "may be held liable . . . for aiding and assisting [a trustee] and furthering his breach of fiduciary duty." *Id.* Thus, Petitioners cannot seriously suggest that the Sixth Circuit has even considered, much less fully analyzed the very different Question Presented here.

B. The Second Circuit

Petitioners also apparently rely on the Second Circuit's decision in *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987), to establish their alleged conflict. In *Lowen*, the trustees of a pension plan filed suit

against their corporate investment manager, a related investment banking corporation, a broker-dealer corporation and their common individual owners. *Id.* at 1211-12. The district court granted summary judgment for the trustees, holding that defendants had violated ERISA's prohibited transaction provisions "by causing the investment of approximately $30 million of the Plan's assets in companies in which one or more of the defendants owned an interest and/or from which one or more defendants received fees or other consideration." *Id.* at 1212. The Second Circuit affirmed. *Id.*

The prohibited transaction allegations set *Lowen* apart from the decision below. It is well settled, even in the Ninth Circuit, that a non-fiduciary who also qualifies as a "party in interest" under ERISA may be held liable for prohibited transactions. *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1988). Petitioners could not state such a claim against Hewitt.[16] Accordingly, the ruling in *Lowen* is not in conflict with that of the Ninth Circuit here.

C. The District of Columbia Circuit

In *Fink v. National Savings & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985), retirement plan beneficiaries brought suit against the plan's trustees to enforce their rights to benefits under the plan and to remedy breaches of fiduciary duty. *Id.* at 953. The district court entered summary

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[16] The count of Petitioners' Complaint which claimed "unlawful party-in-interest transactions" was dismissed and not appealed. (PA25-26.)

judgment in favor of the trustees, but the District of Columbia Circuit reversed and remanded. *Id.*

Fink is patently distinguishable because the issue of non-fiduciary liability was never presented in that case. Like the courts in *Brock* and *Lowen*, the D.C. Circuit noted that whether a particular defendant (who served as an initial *trustee*, not as a service provider) "may be said to have acted as a fiduciary is a disputed issue." *Id.* at 958. As a result, the Court remanded the question of that defendants' liability "as [a] cofiduciar[y]." *Id.* The Court's passing reference that "a district court may award relief against non-fiduciaries who knowingly participate in a breach of trust" is nothing more than gratuitous *dicta*. *Id.* The significant developments in the law since *Fink* was decided, as well as the absence of any analysis of the Question Presented in this case prevent *Fink* from raising any legitimate conflict with the decision below.

D. The Seventh Circuit

Petitioners' reliance on the ten year old decision by the Seventh Circuit in *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982) is similarly inapposite. Plaintiffs in *Thornton* were beneficiaries of a union welfare fund. *Id.* at 1065. They filed suit against various corporations and their attorneys to recover damages allegedly suffered as a result of a conspiracy to defraud the fund of millions of dollars through an insurance scam. *Id.* The district court dismissed the corporate defendants on the pleadings and entered summary judgment for the attorneys. *Id.* The Seventh Circuit reversed, noting that "even though plaintiffs have failed to state a claim against these defendants

as fiduciaries within the meaning of ERISA, they may still have a claim under ERISA on the theory that the defendants conspired with parties who are fiduciaries to breach the duties imposed by ERISA." *Id.* at 1078.

The Seventh Circuit's decision in *Thornton* does not squarely address the Question Presented here. Although several Thornton defendants were service providers, they were not performing statutorily mandated functions, as Respondent was in this case. *Id.* at 1065-66. Moreover, the Seventh Circuit relied heavily upon a district court case which inferred an ERISA cause of action against non-fiduciaries on the basis of trust law principles. *See Freund v. Marshall & Ilsley Bank,* 485 F. Supp. 629 (W.D. Wis. 1979). The rulings in both *Freund* and *Thornton* significantly pre-date this Court's decisions in *Russell* and its progeny as well as Congressional action on OBRA. Accordingly, *Thornton* provides little, if any, support for an argument that the Seventh and Ninth Circuits are currently in conflict on the Question Presented here.[17]

[17] The recent Seventh Circuit decision in *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991) does not suggest otherwise. In that case, although the Seventh Circuit acknowledged the *Thornton* decision without comment or analysis, the Court concluded that a plan trustee's allegations of "incorrect advice" and "misleading reports" were "insufficient to state a claim for inducement by a non-fiduciary of a breach of fiduciary duties." *Id.* at 542.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ, Plaintiffs, v. HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan, Defendants.	No. C 89 4475 SC COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MONETARY RELIEF UNDER ERISA (CLASS ACTION) (JURY TRIAL DEMANDED) (Filed Dec. 18, 1989)

I. JURISDICTION

1. This action for declaratory, injunctive and monetary relief is brought pursuant to § 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), and the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiffs also invoke the Court's pendent jurisdiction over their state law cause of action for professional negligence.

II. THE PARTIES

2. Plaintiff WILLIAM J. MERTENS resides in Concord, County of Contra Costa, State of California.

3. Plaintiff ALEX W. BANDROWSKI resides in Napa, County of Napa, State of California.

4. Plaintiff RUSSELL FRANZ resides in Upland, County of San Bernardino, State of California.

5. Plaintiffs, and each of them, are retired, former salaried employees of Kaiser Steel Corporation ("Kaiser"), a Delaware corporation. Each plaintiff is a "participant" (within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7)) in the Kaiser Steel Retirement Plan ("PLAN"), a defined benefit pension plan established by Kaiser on or about 1977 which was terminated in October, 1986, by the PENSION BENEFIT GUARANTY CORPORATION ("PBGC") pursuant to the distress termination procedures of ERISA § 4041(c), 29 U.S.C. § 1341.

6. At all relevant times, defendant KAISER STEEL RETIREMENT PLAN ("PLAN") was a "defined benefit plan" within the meaning of ERISA § 3(35), 29 U.S.C.

§ 1002(35), and subject to the minimum funding standards imposed by ERISA § 302, 29 U.S.C. § 1082.

7. Upon information and belief, defendant HEWITT ASSOCIATES ("HEWITT") is a partnership established under the laws of the State of Illinois and doing business in the State of California. At all times relevant herein, HEWITT was an "enrolled actuary" within the meaning of ERISA § 3042, 29 U.S.C. § 1242, and regulations promulgated thereunder, and a "party-in-interest" as to the PLAN within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

8. Defendant PENSION BENEFIT GUARANTY CORPORATION ("PBGC") is a wholly-owned United States government corporation created by ERISA § 4002, 29 U.S.C. § 1302, to administer the pension plan termination insurance program established by Title IV of ERISA. PBGC is sued herein as a necessary party in its capacity as statutory trustee of the PLAN. Upon information and belief, there may arise a conflict between plaintiffs and defendant PBGC with respect to any monies recovered herein for the PLAN.

FACTS COMMON TO ALL CLAIMS

9. At all times relevant herein, HEWITT performed all actuarial work on behalf of the PLAN mandated by ERISA and regulations promulgated thereunder. Upon information and belief, Kaiser retained HEWITT on behalf of the PLAN and paid for its services.

10. Commencing in early 1980, Kaiser changed the basic nature of its business. The Company's radical

restructuring culminated in the curtailment and virtual elimination of its steel-making operations.

11. Among other effects, the change in the nature of Kaiser's business resulted in a substantial increase in the number of participants who retired from the Company with an entitlement to unreduced early retirement benefits under the terms of the PLAN.

12. The sharp increase in unreduced early retirements (and related events) imposed material increases in the PLAN's funding costs which were not reflected in the actuarial assumptions developed by HEWITT for the PLAN.

13. Nevertheless, throughout the period of the Company's radical transformation, HEWITT failed on an ongoing basis to change the actuarial assumptions so as to reflect the material increases in the PLAN's funding costs associated with the high number of early retirements.

14. Had HEWITT employed proper actuarial assumptions, then Kaiser would have been obligated to make substantially higher contributions in order to properly fund the PLAN.

15. Upon information and belief, HEWITT performed actuarial services for Kaiser at the same time that it performed services to the PLAN. Upon further information and belief, HEWITT's services to Kaiser related to its obligations to fund the PLAN.

16. Upon information and belief, at no time did HEWITT make full disclosure of its professional relationship with Kaiser, and any potential conflicts associated therewith, to the PLAN's fiduciaries or administrator.

17. Moreover, at no time did HEWITT disclose the material funding inadequacies and the implications thereof in any certificate or other writing which it was obligated to prepare on behalf of the PLAN.

18. As a consequence of HEWITT's acts and omissions, Kaiser failed to make the requisite contributions into the PLAN. The PLAN's assets became insufficient to satisfy its benefit commitments, including the commitments to pay plaintiffs and members of their class their fully vested pensions.

19. In October, 1986, the PBGC determined the PLAN to be severely underfunded and incapable of paying its liabilities, including the full early retirement monthly pension benefits owed to plaintiffs and other similarly situated PLAN participants and beneficiaries. Accordingly, pursuant to the distress termination procedures of ERISA § 4041(c), 29 U.S.C. § 1341, the PBGC terminated the PLAN and began paying plaintiffs and other PLAN participants and beneficiaries substantially reduced monthly pension benefits.

20. Upon termination of the PLAN, the PBGC became the statutory trustee of the PLAN pursuant to ERISA § 4042, 29 U.S.C. § 1342.

21. Before PBGC terminated the PLAN, plaintiff WILLIAM J. MERTENS received a monthly pension benefit in the amount of $2,016.00. Now, he receives only a

$521.00 monthly pension benefit. Before the PLAN was terminated, plaintiff ALEX W. BANDROWSKI received $1,907.00 monthly, but now receives only $670.00 as a monthly pension. Plaintiff JAMES E. CLARKE previously received $2,567.00 monthly, but now receives only $1,103.00 as a monthly pension. Plaintiff RUSSELL FRANZ previously received $1,426.00 monthly, but now receives only $478.00 as a monthly pension.

22. As a result of the underfunding of the PLAN and its termination, plaintiffs and other similarly situated PLAN participants and beneficiaries all now receive substantially less than their entitlements to full early retirement pension benefits.

23. Information regarding the repeated meetings and other occasions when HEWITT's actuaries, employees and agents exercised defendant's fiduciary duties regarding the Kaiser Steel Retirement Plan, or could and should have exercised those duties, is particularly within the knowledge of HEWITT.

24. The acts, omissions and breaches of professional obligations to the PLAN as alleged herein include the ongoing failure of HEWITT to exercise due care, skill, prudence and diligence in employing actuarial methods and assumptions appropriate to the conditions created by the restructuring of Kaiser.

III. CLASS ACTION ALLEGATIONS

25. Plaintiffs bring this action on behalf of themselves and as a class action under the provisions of Rule

23 of the Federal Rules of Civil Procedure on behalf of all members of the class, defined as follows:

> All persons, other than defendants in *Mertens, et al. v. Kaiser Steel Retirement Plan, et al.*, Civil No. C-88-3587-MHP, who are, or have been, participants in or beneficiaries of the PLAN, and whose PLAN benefits were eliminated or reduced as a consequence of the acts and omissions alleged herein.

26. The requirements for maintaining this action as a class action under F.R.Civ.P. 23(a), (b)(1) and (b)(2), are satisfied in that:

> (a) There are numerous class members who are participants or beneficiaries of the PLAN. Their exact number and identities are currently unknown to plaintiffs; but, upon information and belief, approximately 175 participants and beneficiaries constitutes the class.
>
> (b) The members of the class are so numerous that joinder of all members is impracticable.
>
> (c) There are questions of law and fact common to the class, which questions relate to the existence and scope of defendants' duties, actions, and omissions herein alleged.
>
> (d) Plaintiffs are members of said class; their claims are typical of the claims of the class members and they will fairly and adequately protect the interests of the class. The interests of plaintiffs are coincident with, and not adverse to, those of the remainder of the class. Plaintiffs are represented by attorneys who have specialized in ERISA litigation.

(e) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for HEWITT and a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

(f) HEWITT has acted, and refused to act, on grounds generally applicable to the class, thereby making appropriate final injunctive and other equitable relief with respect to the class as a whole.

FIRST ERISA CAUSE OF ACTION

[Breach of Professional Duties to PLAN]

27. Plaintiffs incorporate Paragraphs 1 through 26 as though fully set forth herein.

28. As the PLAN's actuary, HEWITT was subject to the requirements imposed by ERISA, including:

A. ERISA § 302(c)(3), 29 U.S.C. § 1082(c)(3), which provides:

> For purposes of this part, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

B. ERISA § 103(a)(4)(B), 29 U.S.C. § 1023(a)(4)(B), which provides:

> The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section –
>
> (i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and
>
> (ii) represent his best estimate of anticipated experience under the plan.
>
> The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

C. ERISA § 103(d), 29 U.S.C. § 1023, which required, in relevant part:

> (8) A statement by the enrolled actuary –
>
> (A) that to the best of his knowledge the [actuarial] report is complete and accurate, and
>
> (B) the requirements of section 302(c)(3) (relating to reasonable actuarial assumptions and methods) have been complied with.
>
> * * *
>
> (10) A statement by the enrolled actuary which discloses:
>
> (A) any event which the actuary has not taken into account, and
>
> (B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future,

> but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.
>
> * * *
>
> (13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

29. In addition to the foregoing statutory requirements, HEWITT was at all times under an affirmative duty to adhere to regulations defining standards of performance of actuarial services as promulgated by the Joint Board for the Enrollment of Actuaries (JBEA), pursuant to its authority under ERISA § 3042, 29 U.S.C. § 1242.

30. The applicable JBEA regulations imposed *specific* standards of professional conduct on HEWITT, including:

> (b) *Professional duty.* An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.
>
> * * *
>
> (d) *Conflicts of interest.* In any situation in which the enrolled actuary has a conflict of interest with respect to the performance of actuarial services, of which the enrolled actuary has knowledge, he/she shall not perform such actuarial services except after full disclosure has been made to plan trustees, any named fiduciary of the plan, the plan administrator, and, if the plan is subject to a collective bargaining

> agreement, the collective bargaining representative.
>
> (e) *Assumptions, calculations and recommendations.* The enrolled actuary shall exercise due care, skill, prudence and diligence to ensure that:
>
> > (1) The actuarial assumptions are reasonable in the aggregate and the actuarial cost method and the actuarial method of valuation of assets is appropriate.
> >
> > (2) The calculations are accurately carried out, and
> >
> > (3) The report, any recommendations to the plan administrator and any supplemental advice or explanation relative to the report reflect the results of the calculations.
>
> (f) *Report or certificate.* An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed.

(ERISA Regs. § 901.20, 42 FR 39204.)

31. In addition, under IRS REG. § 1.412(c)(1)-1, HEWITT had a duty to the PLAN to choose actuarial assumptions appropriate to the funding method selected by Kaiser. HEWITT had no legal right to delegate that responsibility to Kaiser or to allow Kaiser to select or impose actuarial assumptions of its own choosing.

32. Nevertheless, upon information and belief, HEWITT either delegated the responsibility to Kaiser for selecting the PLAN's actuarial assumptions or allowed Kaiser to impose its choice of assumptions. Upon further information and belief, HEWITT did so in order not to jeopardize its lucrative professional relationship with Kaiser.

33. By the acts and omissions described herein, HEWITT breached each of the foregoing ERISA provisions and applicable regulations relating to its professional obligations to the PLAN.

34. As a direct and proximate result, the PLAN became severely underfunded with the consequence that plaintiffs and their class have lost their fully earned vested retirement benefits.

35. Upon information and belief, HEWITT failed to employ proper actuarial assumptions so as to allow Kaiser to avoid paying higher contributions into the PLAN and in order to pursue its lucrative business relationship with Kaiser. Therefore, in committing the acts and omissions set forth herein, HEWITT acted intentionally, maliciously and/or with wanton indifference to the integrity of the PLAN and the rights of plaintiffs and their class, thereby justifying an award of punitive damages.

SECOND ERISA CAUSE OF ACTION

[Unlawful Party-In-Interest Transactions]

36. Plaintiffs incorporate paragraphs 1 through 26 and 28 through 35 as though fully set forth herein.

37. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(B), prohibits transactions involving a direct or indirect lending of money or other extension of credit between a plan and a party-in-interest.

38. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits transactions involving a direct or indirect furnishing of goods, services, or facilities between a plan and a party-in-interest.

39. ERISA § 408(b), 29 U.S.C. § 1108(b), exempts service providers to ERISA plans from the prohibitions of Section 406 " . . . if no more than reasonable compensation is paid . . . " for the services.

40. Because it breached its obligations, duties and responsibilities to the PLAN, failed to exercise due care, skill, prudence and diligence in the performance of its duties, and provided services to Kaiser in conflict to its obligations to the PLAN, HEWITT's compensation was not reasonable. Accordingly, by receiving compensation for the services it provided PLAN, HEWITT committed a prohibited transaction in violation of ERISA § 408.

PRAYER FOR RELIEF UNDER ERISA

WHEREFORE, on the First and Second Causes of Action, plaintiffs, pursuant to ERISA § 502(a)(3), pray that the Court:

A. Grant declaratory relief to the effect that HEWITT breached the duties, obligations and responsibilities imposed on it by ERISA and JBEA Regulations;

B. Declare that HEWITT failed to assure that the PLAN met the minimum funding standards imposed by ERISA § 302, 29 U.S.C. § 1082.

C. Grant judgment against HEWITT and order it to make good to the PLAN, plaintiffs and their class any and all losses to the PLAN resulting from its breaches of ERISA;

D. Grant judgment for punitive damages;

E. Grant judgment for pre-judgment interest;

F. Appoint a fiduciary for the PLAN to receive all funds restored by HEWITT and to distribute and/or pay benefits out of such restored funds to plaintiffs and their class;

G. Declare the respective rights of plaintiffs and their class and the defendant PBGC to any funds restored to the PLAN;

H. Grant judgment for the costs of suit herein and plaintiffs' attorneys' fees, pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g); and,

I. Grant such other and further legal and equitable relief as the Court deems appropriate.

THIRD CAUSE OF ACTION

(Professional Negligence Under California Law)

41. Plaintiffs incorporate Paragraphs 1 through 26 and 28 through 35 as though fully set forth herein.

42. During all relevant times, HEWITT has held itself out to the public and to the PLAN as a qualified enrolled actuary for ERISA-regulated employee benefit plans, with the requisite degree of skill and knowledge

necessary to assure that client-plans are maintained in compliance with all applicable law.

43. At all times relevant herein, HEWITT had an agreement whereby HEWITT, on a fee basis, agreed to perform and purported to perform all actuarial work on behalf of the PLAN mandated by ERISA and regulations promulgated thereunder.

44. By entering into the agreement described herein, HEWITT impliedly represented and warranted that in carrying out its responsibilities to the PLAN, it would use due care, skill, prudence and diligence. Said representation was made for the benefit of plaintiffs and their class in their capacities as the PLAN's participants and beneficiaries.

45. Nevertheless, HEWITT, in performing its actuarial services, failed to take into account the radical restructuring of Kaiser and related corporate events. Thus, HEWITT did not employ reasonable actuarial assumptions in the aggregate and, among other acts and omissions, failed to properly consider the impact on the PLAN's funding of the Company's radical restructuring.

46. Moreover, upon information and belief, HEWITT failed to advise the PLAN's fiduciaries of its employment by Kaiser and consequent conflict of interest regarding its services to the PLAN.

47. As a direct and proximate result of the HEWITT's professional malpractice as alleged herein, the PLAN became severely underfunded, thus preventing plaintiffs and other PLAN participants and beneficiaries

from receiving their fully earned vested retirement pension benefits.

48. In committing the acts and omissions set forth herein, HEWITT acted intentionally, maliciously and/or with wanton indifference to the rights of plaintiffs and other PLAN participants and beneficiaries, thereby justifying an award of punitive damages.

PRAYER FOR RELIEF REGARDING PENDENT STATE LAW CLAIM

WHEREFORE, plaintiffs prays [sic]:

A. For all damages according to proof;

B. For costs of suit incurred herein;

C. For punitive damages according to proof;

D. For such other and further relief as may be deemed just and proper.

Dated: December 18, 1989

Respectfully submitted,

SIGMAN & LEWIS

ANDREW THOMAS SINCLAIR

By: /s/ Stephen Bingham
Stephen Bingham

DEMAND FOR A JURY TRIAL

Plaintiffs hereby demand a jury trial as provided for in F.R.Civ.P. 38.

Dated: December 18, 1989

Respectfully submitted,

SIGMAN & LEWIS

ANDREW THOMAS SINCLAIR

By: /s/ Stephen Bingham
Stephen Bingham

No. 91-1671

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM J. MERTENS, ET AL., PETITIONERS

v.

HEWITT ASSOCIATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a nonfiduciary who knowingly participates in a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, is liable for losses that an employee benefit plan sustains as a result of the breach.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of ERISA are reproduced in the Appendix, *infra*, 1a-3a.

STATEMENT

1. Petitioners are former employees of the Kaiser Steel Corporation (Kaiser) and participants in the Kaiser Steel Retirement Plan (the plan), a qualified pension plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*[1] In 1980, while respondent was serving as the plan's actuary, Kaiser began to phase out its steel-making operations. That action

[1] This case was decided on a motion to dismiss and therefore the allegations of petitioners' complaint are taken as true. Pet. App. A2, A19.

resulted in the early retirement of a greatly increased number of employees. Respondent, however, used actuarial assumptions that did not reflect the increased costs associated with the new developments. As a result, Kaiser did not adequately fund the plan, and plan assets became insufficient to satisfy benefit obligations. In October 1986, the Pension Benefit Guaranty Corporation (PBGC) determined that the plan was underfunded and incapable of paying its liabilities. The PBGC terminated the plan and began paying its participants substantially reduced benefits. Pet. App. A2-A3, A17-A18.

In December 1989, petitioners filed this action alleging that respondents violated ERISA and state malpractice law. Petitioners claimed that respondent had caused losses to the plan by allowing Kaiser to set actuarial assumptions, failing to disclose that it served as an actuary for both Kaiser and the plan, and failing to disclose the plan's funding inadequacies. Petitioners argued that respondent violated ERISA by breaching respondent's professional duties to the plan[2] and by participating in an unlawful party-in-interest transaction.[3] When respondent moved to dismiss the complaint for failure to plead causes

[2] ERISA imposes various requirements concerning actuarial services. See, *e.g.*, 29 U.S.C. 1023(d) (certain ERISA plan administrators must prepare annual reports including statements by enrolled actuaries), 1082(c)(3) (costs, liabilities, interest rates and other factors are to be calculated on the basis of "reasonable" actuarial assumptions that offer the actuary's "best estimate of anticipated experience under the plan"). Petitioners alleged that in providing actuarial services to the plan, respondent failed to comply with the obligations set forth in ERISA and implementing regulations. Br. in Opp. App. RA12.

[3] Section 406(a)(1)(C) of ERISA forbids various transactions between a plan and a "party in interest"—including the furnishing of services. 29 U.S.C. 1106(a)(1)(C). The statute defines the term "party in interest" to include a provider of services to a plan, 29 U.S.C. 1002(14), but exempts from the prohibitions of Section 406 any service contract for which "no more than reasonable compensation is paid." 29 U.S.C. 1108(b)(2). Petitioners claimed that respondent's fees were not "reasonable" because respondent's conflict of interest prevented it from providing adequate services to the plan. Br. in Opp. App. RA13.

of action cognizable under ERISA, petitioners advanced several legal theories: (1) that respondent was an ERISA fiduciary that breached its fiduciary duties; (2) that even if respondent was not a fiduciary, it was liable under ERISA for knowing participation in a breach of fiduciary duty; and (3) that respondent violated ERISA by breaching nonfiduciary duties imposed on an actuary by the statute. Pet. App. A2-A4.[4]

2. The district court dismissed petitioners' claims. Pet. App. A17-A30. The court found that respondent was not a fiduciary, because professional service providers such as actuaries, attorneys, and accountants do not act as fiduciaries when they perform ordinary services. *Id.* at A20-A22. The court dismissed petitioners' claim for monetary relief arising from respondent's alleged violation of its professional duties under ERISA. The court observed that Sections 502(a)(3) and (a)(5) of ERISA, 29 U.S.C. 1132(a)(3) and (a)(5) (App., *infra*, 1a-2a), expressly authorize an award of "equitable relief" against an actuary, but that petitioners did not allege facts entitling them to equitable relief such as restitution. Pet. App. A23-A25. The court also found that petitioners' "prohibited transaction" claim was merely an effort to recast the claimed breach of professional duty as a prohibited transaction. *Id.* at A25-A [illegible] Finally, the court dismissed petitioners' claim that E[illegible] created a right of recovery against respondent as a knowing participant in a fiduciary breach. The court relied on the Ninth Circuit's decision in *Nieto* v. *Ecker*, 845 F.2d 868 (1988), which held that ERISA does not create a cause of action for such claims against nonfiduciaries.[5] Pet. App. A22.

[4] In a related action, petitioners filed an ERISA claim against members of the Investment Committee of the Kaiser Steel Retirement Plan, alleging that they violated their fiduciary duties. *Mertens* v. *Black*, 948 F.2d 1105 (9th Cir. 1991) (upholding district court's refusal to dismiss on res judicata grounds claims against investment committee members).

[5] The district court also held that petitioners' pendent state-law claim for professional negligence was barred by the State's two-year statute of limitations. Pet. App. A26-A27.

3. The court of appeals affirmed the dismissal of petitioners' ERISA claims. Pet. App. A1-A13.[6] It agreed with the district court that respondent did not act as a plan fiduciary in providing actuarial services, *id.* at A5-A6, and that petitioners had not stated a proper claim for a breach of actuarial duties under ERISA, *id.* at A10-A11. Relying on *Nieto*, moreover, the court affirmed the ruling that a nonfiduciary such as respondent could not be held liable for knowing participation in a fiduciary breach. *Id.* at A6-A9. The court emphasized its earlier reasoning that the fiduciary liability provisions in Section 409(a) of ERISA, 29 U.S.C. 1109(a) (App., *infra*, 1a), impose liability on fiduciaries only, and that "nothing in the statute provides any support for holding others liable under that section." Pet. App. A7.

The court rejected the argument that the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 2101, 103 Stat. 2123, demonstrates that Section 502(a) authorizes a remedy against nonfiduciaries for knowing participation in a breach of fiduciary duty. Pet. App. A8. OBRA amended ERISA to add Section 502(*l*), 29 U.S.C. 1132(*l*) (Supp. II 1990) (App., *infra*, 2a-3a), which authorizes the Secretary of Labor to assess a civil penalty against fiduciaries and "other person[s]" for a breach of fiduciary duty under ERISA or "knowing participation" in such a breach. The penalty under Section 502(*l*), moreover, is based on amounts recovered by the Secretary in civil actions brought under specified subsections of Section 502(a). The court acknowledged that some of the relevant provisions of Section 502(a) authorize not only the Secretary but also plan participants to bring civil actions. But it rejected petitioners' argument that the relationship between Sections 502(*l*) and 502(a) demonstrates that Congress implicitly intended to authorize participants to sue nonfiduciaries under Section 502(a). Rather, the court held that Section 502(*l*)

[6] Although the court of appeals affirmed the dismissal of petitioner's ERISA-based claims, it reversed the trial court's ruling that a pendent state law professional negligence claim was time-barred. Pet. App. A11.

"applies to the Secretary only, not to plan participants." The court also noted that in enacting OBRA, Congress considered, but did not adopt, an amendment that would have overturned the result in *Nieto*. Pet. App. A8-A9.

Petitioners filed a petition for rehearing with a suggestion of rehearing en banc, urging the Ninth Circuit to overrule *Nieto*.[7] The court of appeals, however, denied further review. Pet. App. A15-A16.

DISCUSSION

In our view, the court of appeals erred in holding that ERISA does not authorize a cause of action for monetary relief against a nonfiduciary who knowingly participates in a breach of fiduciary duty. Section 502(a)(3) authorizes civil actions to redress violations of ERISA's fiduciary requirements, and that section is not limited by its terms to actions against fiduciaries. Although ERISA does not define the precise scope of relief available against nonfiduciaries under Section 502(a)(3), this Court's precedents establish that Congress authorized courts to define those limits through the development of federal common law. Under traditional trust rules—which serve as guiding principles for the adoption of common law rules under ERISA—a nonfiduciary is accountable for losses resulting from knowing participation in a breach of fiduciary duty. Further, Congress's recent enactment of Section 502(*l*) confirms that Congress did not intend to abolish breach of fiduciary duty actions against nonfiduciaries when it adopted ERISA, and that instead, Section 502(a)(3) was drafted broadly to authorize federal courts to provide such relief.

This question has nevertheless been the subject of a persistent and widening conflict among the circuits. It is an issue of substantial importance to the proper enforcement of ERISA, and we accordingly believe that further review is warranted.

[7] The Secretary of Labor filed a brief *amicus curiae* in support of that petition. See Pet. App. A14.

1. ERISA codifies a series of fiduciary responsibilities, obligations, and duties relating to the administration of employee benefit plans. See, *e.g.*, 29 U.S.C. 1104 (enumerating fiduciary duties), 1106 (specifying prohibited transactions), 1112 (imposing bonding requirements on fiduciaries).[8] Section 409 of ERISA, 29 U.S.C. 1109, moreover, specifies remedies against a fiduciary who breaches ERISA-imposed duties. First, a fiduciary is "personally liable to make good to [the] plan any losses * * * resulting from each * * * breach" of fiduciary duty. 29 U.S.C. 1109(a). Second, a court may order a breaching fiduciary to "restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan." *Ibid.* Third, a court may remove a fiduciary to remedy a breach of his duties under ERISA. *Ibid.* In addition, Section 409 generally provides that a fiduciary shall be subject to "such other equitable or remedial relief as the court may deem appropriate." *Ibid.*

Because Section 409 authorizes remedies for breaches of fiduciary duty and names only fiduciaries as potential defendants, the Ninth Circuit concluded that ERISA does not authorize a cause of action against a nonfiduciary for losses arising from a breach of fiduciary duty. See Pet. App. A7; *Nieto*, 845 F.2d at 870-873. The Ninth Circuit, however, placed far too much weight on Section 409's failure to address the liability of nonfiduciaries and far too little weight on the express remedial language of Section 502(a)(3). Section 409 "is simply one section among many that impose liability on those who violate [ERISA's] substantive provisions," *Nieto*, 845 F.2d at 875 (Wiggins, J., concurring).[9] In contrast, Section 502(a)(3), 29 U.S.C. 1132(a)(3), authorizes suit "by a participant" to obtain "appropriate equitable relief" "to redress" violations of or "to enforce" any provision of ERISA's "employee benefit rights" subchapter or the "terms of the plan." An action by a "participant" against a nonfiduciary for participation in a breach of fiduciary duty certainly represents an action to "redress" violations of and "enforce" the provisions of the relevant subchapter that concern fiduciary responsibility. Section 502(a)(3), unlike Section 409, does not restrict its scope to a class of defendants limited to fiduciaries.[10] See *Nieto*, 845 F.2d at 874. Thus, there should be no question that Section 502(a)(3) authorizes "appropriate equitable relief" against a nonfiduciary who knowingly participates in such violations. Contrary to the decision below, Pet. App. A7-A8, we believe that under federal common law, "appropriate equitable relief" should encompass a right to recover plan losses from a nonfiduciary who knowingly participates in a breach of fiduciary duty.

2. a. The scope of "appropriate equitable relief" under ERISA is necessarily determined by reference to federal common law. As this Court has explained, "ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). Accordingly, ERISA authorizes courts "to develop a 'federal common law of rights and obligations under ERISA-regulated plans,'" *ibid.*, and courts are therefore to consult traditional principles of trust law in deriving federal common law under ERISA, see, *e.g.*, *id.* at 111-115; *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

[8] In general, "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest. Those duties are described in Part 4 of Title 1 of the Act, which is entitled 'FIDUCIARY RESPONSIBILITY,' see §§ 401-414, * * * 29 U.S.C. §§ 1101-1114." *Massachusetts Mutual Life Insur. Co.* v. *Russell*, 473 U.S. 134, 142-143 (1985) (footnote omitted).

[9] The fact that Section 409 does not mention remedies against nonfiduciaries is not surprising. That section is contained in Part IV, which defines the obligations of "fiduciaries" under ERISA.

[10] Indeed, in *Nieto*, the court determined (845 F.2d at 873-874) that relief is available under Section 502(a)(3) against nonfiduciaries who engage in prohibited transactions under Section 406, 29 U.S.C. 1106.

This Court has already determined, moreover, that ERISA's authorization to develop federal common law extends to the remedial provisions set forth in Section 502(a). In *Firestone*, the Court considered the proper scope of judicial review for challenges to a plan's denial of benefits in suits under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B). Even though ERISA contains "a panoply of remedial devices" and is "a comprehensive and reticulated statute," the Court concluded that Congress had not addressed all issues arising under that remedial scheme, but had instead delegated common law authority to the judiciary to answer unresolved questions. 489 U.S. at 108-109. The Court examined established principles of trust law and exercised its authority to create a federal common law rule defining the scope of the remedy under ERISA. *Firestone*, 489 U.S. at 111-115.

There are persuasive reasons to construe the federal common law of trusts as authorizing a remedy against a nonfiduciary for losses arising from its knowing participation in a breach of fiduciary duty. First, "established principles of trust law," *Firestone*, 489 U.S. at 115, and "the common law of trusts," *Central States*, 472 U.S. at 570, provide that a knowing participant in a breach of fiduciary duty—even if not a fiduciary—may be held liable for losses sustained by beneficiaries as a result of the breach. See, *e.g.*, G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 901 (rev. 2d ed. 1982); 4 A. Scott & W. Fratcher, *The Law of Trusts* §§ 326-326.6 (4th ed. 1989); Restatement (Second) of Trusts § 326 (1959).[11] In addition, where a trustee's agent knowingly participates and assists in a breach of fiduciary duty, the agent may be liable for losses arising from the breach. See, *e.g.*, 4 A. Scott & W. Fratcher, *supra*, § 326.4; Restatement (Second) of Trusts, *supra*, § 326 cmt. a. An action such as that brought by petitioners here—against an actuary alleged to have knowingly participated in a

[11] This Court has repeatedly consulted the sources cited in the text in fashioning federal common law rules under ERISA. See, *e.g.*, *Firestone*, 489 U.S. at 111-112, 115; *Central States*, 472 U.S. at 570 n.11.

breach of fiduciary duty while acting as the fiduciary's agent—would be cognizable as an equitable action under traditional principles of trust law.[12]

[12] Respondent suggests that the make-whole relief requested by petitioners constitutes a "damage[s]" remedy not cognizable in equity. Br. in Opp. 8-9. That contention, however, misapprehends the nature of actions for breach of trust. "Trusts are, and have been since they were first enforced, the peculiar province of courts of equity." 3 A. Scott & W. Fratcher, *supra*, § 197, at 188; see *Lessee of Smith* v. *McCann*, 65 U.S. (24 How.) 398, 407 (1861) (equity has "exclusive jurisdiction of trusts and trust estates"). Thus, although a beneficiary's action to recover losses resulting from a breach of duty may superficially resemble an action at law for damages, such relief has traditionally been obtained in courts of equity. See, *e.g.*, 3 A. Scott & W. Fratcher, *supra*, §§ 199.3, 205; Restatement (Second) of Trusts, *supra*, §§ 199, 205; 4 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 1080 (S. Symons 5th ed. 1941). When a nonfiduciary knowingly participates in a breach of fiduciary duty, his liability for the trust's losses typically also arises from the duties imposed by equity upon the breaching trustee. See, *e.g.*, *Strauss* v. *United States Fidelity & Guaranty Co.*, 63 F.2d 174, 178 (4th Cir.), cert. denied, 289 U.S. 747 (1933); *Safe Deposit & Trust Co.* v. *Cahn*, 62 A. 819, 822 (Md. 1906); see also, *e.g.*, G. Bogert & G. Bogert, *supra*, § 901, at 257 (rights against nonfiduciary derive from beneficiary's status "as equitable owner of the trust res"). Accordingly, "[a]nyone who participates with a trustee in a breach of trust may be held liable in a court of equity to the *cestui que trust*. * * * [I]f he has never received or no longer holds the trust property or its proceeds, he may be held liable in equity for damages." Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 454 (1921).

Indeed, in *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478 (1990), this Court made clear that "appropriate equitable relief" under Section 502(a)(3) includes make-whole relief. In that case, a plan participant sued in state court, alleging that he had been discharged from employment to prevent his ERISA-covered pension from vesting. Among the relief requested was compensatory damages. 111 S. Ct. at 481. This Court concluded that the participant's state-court cause of action was preempted "because it conflicts directly with an ERISA cause of action." *Id.* at 485. In particular, the Court noted (1) that Section 510 of ERISA, 29 U.S.C. 1140, protects participants from being dismissed in order to prevent the vesting of their pensions, (2) that Section 502(a)(3) authorizes a cause of action for violations of that provision, and (3) that Section 502(e), 29 U.S.C. 1132(e), gives federal courts exclusive jurisdiction over actions brought under Section 502(a)(3). 111 S. Ct. at 485. In so holding,

Second, applying the traditional trust law rule of nonfiduciary liability serves "the policy of the legislation," *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957), which is to "protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b).[13] This rule would deter and prevent violations of ERISA's fiduciary requirements, and provides greater assurance that ERISA plan participants and beneficiaries will receive full relief for their losses. Indeed, because the common law of trusts recognized a remedy against nonfiduciaries for their participation in breaches of fiduciary duty, see pp. 8-9, *supra*, and any such claim is now preempted to the extent that it "relates to an[] employee benefit plan" covered by ERISA, 29 U.S.C. 1144(a); see, *e.g.*, *Gibson* v. *Prudential Insurance Co. of America*, 915 F.2d 414, 418 (9th Cir. 1990), the Ninth Circuit's narrow reading of Section 502(a)(3) would afford participants in employee benefit plans *less* protection than they had before ERISA was enacted. This Court, however, has previously rejected an interpretation of Section 502(a) that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 114.

b. The recent enactment of Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*) (Supp. II 1990), further confirms that "appropriate equitable relief" under ERISA includes monetary relief against nonfiduciaries who knowingly participate in breaches of fiduciary duty. Section 502(*l*)(1) provides in relevant part:

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this Court rejected the argument that the action was not covered by Section 502(a) because the plaintiff did not seek benefits; rather, the Court made clear that "the relief requested here"—which included compensatory relief—"is well within the power of federal courts to provide" under ERISA. 111 S. Ct. at 486.

[13] See also 120 Cong. Rec. 29,932 (1974) (remarks of Sen. Williams) (statute's objectives "are to make applicable the law of trusts; * * * to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust").

> In the case of—
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or
>
> (B) *any knowing participation in such a breach or violation by any other person,*
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of *the applicable recovery amount.*

29 U.S.C. 1132(*l*)(1) (Supp. II 1990) (emphasis added). Section 502(*l*)(2), in turn, defines the term "applicable recovery amount" to include "any amount * * * ordered by a court to be paid by such fiduciary *or other person* to a plan or its participants and beneficiaries in a judicial proceeding" instituted by the Secretary under Sections 502(a)(2) or (a)(5) of ERISA. 29 U.S.C. 1132(*l*)(2) (Supp. II 1990) (emphasis added).

The provisions of Section 502(*l*)(1) and (2) do not make sense unless Section 502(a)(5)—which authorizes the Secretary to seek "appropriate equitable relief" to redress violations of and enforce ERISA's employee benefit rights provisions—authorizes monetary relief against nonfiduciaries for knowingly participating in breaches of ERISA's fiduciary requirements.[14] It fol-

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[14] The first cross-referenced provision of Section 502(a)—subsection (a)(2)—is exclusively the enforcement mechanism for Section 409. Because Section 409 authorizes relief only against fiduciaries, Section 502(a)(2)'s authority is also limited to that type of relief. Cf. *Massachusetts Mutual Life Insur. Co.* v. *Russell*, 473 U.S. 134, 139-140 (1985). Thus, Congress's evident contemplation of an "applicable recovery amount" against "other persons" (*i.e.*, nonfiduciaries) under Section 502(*l*) necessarily reflects its understanding that "appropriate equitable relief" under the second cross-referenced provision of Section 502(a)—subsection (a)(5)—encompasses monetary claims against nonfiduciaries who knowingly participate in breaches of ERISA's fiduciary requirements. Otherwise, there would be no "recovery amount" upon which to base a civil fine for the "knowing participation" of "other person[s]" in fiduciary breaches under Section 502(*l*)(1)(B).

lows, therefore, that Section 502(a)(3) does so as well, because that Section gives a "participant, beneficiary, or fiduciary" authority—identical to the Secretary's authority under Section 502(a)(5)—to seek "appropriate equitable relief" to redress violations of and enforce ERISA's employee benefit rights provisions, which include the statute's fiduciary responsibility requirements. It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); accord *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (same), and there is no reason to assume that Congress intended to provide the Secretary greater authority to request relief under Section 502(a)(5) than it gave private parties under Section 502(a)(3). See H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973) (ERISA's remedial provisions were "designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act"). Thus, both subsections should be interpreted to allow monetary relief against nonfiduciaries for knowing participation in breaches of fiduciary duty.[15]

[15] Although Congress enacted Section 502(*l*) as part of OBRA, the court of appeals concluded (Pet. App. A9) that OBRA supports the holding of *Nieto*, because Congress considered but did not enact an amendment to ERISA that would have explicitly authorized claims against persons who knowingly participate in fiduciary breaches. See H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6) (1989); 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). Such congressional inaction, however, "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States* v. *Wise*, 370 U.S. 405, 411 (1962)). In the circumstances surrounding enactment of OBRA, the most plausible inference is that Congress failed to act because ERISA already authorized the relief at issue. The House Report accompanying OBRA noted that, at the time of the proposed amendment, "[a]ll but one of the Circuit Courts of Appeal that ha[d] considered the issue ha[d] held that the broad remedial powers conferred on federal courts under ERISA section 502(a)(3) and (5) create an implied cause of action against

3. This interpretation of ERISA is also consistent with *Massachusetts Mutual Life Insur. Co.* v. *Russell*, 473 U.S. 134 (1985), relied upon by the Ninth Circuit to support its contrary conclusion in *Nieto*, 845 F.2d at 872. In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of her claim for benefits, asserting a right to recover compensatory and punitive damages that were not available under the terms of the plan. But Section 502(a)(1)(B) expressly authorizes a beneficiary who has wrongfully been denied benefits to bring a claim "to recover benefits due to him *under the terms of his plan*." 29 U.S.C. 1132(a)(1)(B) (emphasis added). The claim asserted by the beneficiary therefore exceeded the congressional description of the beneficiaries' remedy (473 U.S. at 144), and the Court in *Russell* was asked to decide whether the apparent limitations on the remedy set forth in that Section could be avoided by permitting the claim to proceed under Section 502(a)(2), 29 U.S.C. 1132(a)(2), which permits a beneficiary to sue a fiduciary for a breach of fiduciary duty under Section 409.

The Court declined to read Section 409 as enlarging the beneficiary's "explicitly authoriz[ed]" (473 U.S. at 144) right to recovery for wrongful denial of benefits. Instead, the Court interpreted Section 409—which provides that a fiduciary "with respect to [an ERISA] plan" is personally liable to "make good to such plan any losses to the plan" resulting from a breach of the fiduciary's duties—to require that damages under Section 409 "inure[] to

non-fiduciaries who knowingly participate in breaches of fiduciary duty proscribed by ERISA." H.R. Rep. No. 247, 101st Cong., 1st Sess. 77 (1989). The Ninth Circuit alone had held to the contrary. *Ibid.* In our view, it is implausible to infer that Congress's decision not to enact the proposed amendment reflects acquiescence in what was acknowledged to be the distinctly minority view of the statute. In addition, the amendment was proposed to "clarify[]" the existence of a right of action against nonfiduciaries. *Ibid.* That action was ultimately unnecessary because OBRA amended ERISA to add Section 502(*l*), which itself clarified that Sections 502(a)(3) and (a)(5) authorize claims for monetary relief against nonfiduciaries who knowingly participate in breaches of fiduciary duty.

the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. Although Section 409 authorizes a court to award "such other equitable or remedial relief as the court may deem appropriate," 29 U.S.C. 1109(a), the Court found that this language only authorized "'plan-related' relief," and not a beneficiary's suit for extracontractual damages on her own account. 473 U.S. at 142.

In contrast to petitioners here, the beneficiary in *Russell* sued exclusively under Section 409 and placed no reliance on Section 502(a)(3). The Court accordingly reserved the question whether a beneficiary has a cause of action for extracontractual damages under the broad terms of the latter section. 473 U.S. at 139 n.5. The Court's determination that the unenumerated relief was unavailable in that case therefore cannot be understood to mean that a federal common law cause of action is unavailable under Section 502(a)(3) if the requested relief is not also expressly authorized under a more specific provision of ERISA, such as Section 409.

Indeed, such a broad reading of *Russell* would render Section 502(a)(3) a nullity, contrary to the well-settled principle that a statute should be construed, if possible, to give effect to all of its provisions. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).[16] It would also

[16] We disagree with the Ninth Circuit's conclusion (*Nieto*, 845 F.2d at 873) that recognizing a federal common law right to make-whole relief for breaches of fiduciary duty under Section 502(a)(3) would render the specific provisions of Section 409 superfluous. As discussed, see p. 6, *supra*, Section 409 not only provides general authority to award appropriate relief against a fiduciary who breaches his duties under ERISA, but also provides that a fiduciary shall be subject to certain very definite remedies for breaching the duties imposed under ERISA—specifically, make-whole relief for the plan, disgorgement of profits earned in breach of trust, and removal of a fiduciary. 29 U.S.C. 1109(a). Even if Section 502(a)(3) authorizes courts to derive the same remedies as a matter of federal common law, the enumeration of certain remedies in Section 409 is not superfluous, because it ensures that the specified relief will be available irrespective of how federal common law under ERISA may evolve. In effect, therefore, Section 409 places a floor under the types of relief available from a fiduciary.

be inconsistent with the overall structure of Section 502(a), which "set[s] forth a comprehensive civil enforcement scheme," *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 485 (1990), that complements several specific provisions—such as the subsections of Section 502(a) at issue in *Russell*—with two more general provisions, Sections 502(a)(3) and (a)(5), that broadly authorize "appropriate equitable relief * * * to redress violations" of ERISA's employee benefit right provisions.[17]

Further, no section of ERISA explicitly addresses the right of a plan participant or beneficiary to sue nonfiduciaries for knowing participation in a fiduciary breach. Rather, to the extent that ERISA speaks to such a right at all, Section 502(*l*) supplies the unmistakable implication that "appropriate equitable relief" under Sections 502(a)(3) and (a)(5) encompasses a cause of action for monetary relief against nonfiduciaries who knowingly participate in breaches of fiduciary duty under ERISA. Because the only question left unanswered is the scope of available relief, this case is controlled not by *Russell*, but by *Firestone*—which requires resort to a federal common law of trusts where Congress has not explicitly addressed a remedial issue.

4. a. The question whether ERISA recognizes a cause of action for a nonfiduciary's knowing participation in a fiduciary breach is the subject of persistent and growing conflict among the circuits. Contrary to the Ninth Circuit, several other courts of appeals have recognized the general principle that a nonfiduciary may be liable under ERISA for knowing participation in a breach of fiduciary duty. See *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), cert. denied, 490 U.S. 1089 (1989); *Brock* v. *Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Thornton* v. *Evans*, 692 F.2d

[17] As we have shown, because traditional trust law authorizes an equitable claim for make-whole relief from a nonfiduciary who has knowingly participated in a breach of fiduciary duty, the plain language of Section 502(a)(3) readily accommodates petitioners' claims in this case.

1064, 1078 (7th Cir. 1982); see also *Fink* v. *National Savings & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum). In addition, the Eleventh Circuit in *Useden* v. *Acker*, 947 F.2d 1563, 1582 (1991), petition for cert. pending, No. 91-1944 (filed June 1, 1992), recently joined the Ninth Circuit in holding that ERISA creates no remedy analogous to damages against a nonfiduciary who knowingly participates in a breach of fiduciary duty.[18] The conflict among the circuits, moreover, has been noted by a number of courts. See, *e.g.*, *Useden*, 947 F.2d at 1579-1580; *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 737 F. Supp. 792, 804 (S.D.N.Y. 1990); *Dole* v. *Compton*, 753 F. Supp. 563, 567-568 (E.D. Pa. 1990); *Pension Fund-Mid Jersey Trucking Industry Local-701* v. *Omni Funding Group*, 731 F. Supp. 161, 176-177 (D.N.J. 1990); see also *Nieto*, 845 F.2d at 874 (Wiggins, J., concurring).

b. Respondent argues that the contrary decisions either predate or do not address this Court's decision in *Russell*, and that if reconsidered in light of *Russell*, the re-

[18] In our view, the decision in this case presents a better vehicle for reviewing the issue than does *Useden*. The court of appeals in this case, unlike the court in *Useden*, gave full consideration to the effect of OBRA on the issue presented. In addition, the Ninth Circuit has refused to apply the federal common law to determine available relief against a nonfiduciary, making the law of that circuit broader than the ruling in *Useden*, which merely held that federal common law under ERISA does not include an equitable cause of action analogous to money damages. In addition, the district court in *Useden* held in the alternative that "even if there is a cause of action for non-fiduciary liability * * * the record is devoid of evidence indicating that [respondents in that case] knowingly participated in any breach of fiduciary duty owed by the plan fiduciaries." *Useden* v. *Acker*, 721 F. Supp. 1233, 1244-1245 (S.D. Fla. 1989). In affirming the trial court's decision on the ground that money damages are unavailable against a nonfiduciary under Section 502(a)(3), the Eleventh Circuit did not address the district court's alternative holding. Thus, petitioners in *Useden* may not obtain relief even if the judgment of the court of appeals is reversed. We therefore believe that this Court should grant the petition in the present case and hold *Useden* pending the disposition of that petition.

sult in those cases would be different. Br. in Opp. 9-10. *Russell*, however, did not address the scope of Section 502(a)(3) or the availability of remedies against nonfiduciaries and, as noted, see pp. 13-15, *supra*, its reasoning does not undermine the decisions that have recognized the remedy sought by petitioners.[19] Similarly unpersuasive is respondent's argument (Br. in Opp. 5) that there is no conflict because the courts that have recognized a right of action all did so prior to OBRA's enactment in 1989. As we have previously shown, see pp. 10-12, *supra*, OBRA confirms that ERISA authorizes a right of action against nonfiduciaries who knowingly participate in breaches of fiduciary duty. Thus, it is hardly to be expected that the courts of appeals that have recognized such a right will revisit the issue in light of OBRA. What is significant, however, is that the Ninth Circuit in this case explicitly considered the effect of OBRA, it nevertheless adhered to its decision in *Nieto*, and the court declined the suggestion of petitioners and the United States to hear the case en banc. Accordingly, it is clear that the Ninth Circuit will not recede from its minority position based on the enactment of Section 502(*l*) in OBRA, and the conflict in authority will likely persist.[20]

c. Respondent also asserts a variety of case-specific distinctions that do not negate the fact that there is a conflict among the circuits. First, respondent seeks to distinguish *Whitfield* and *Hendershott* on the ground that those actions were brought by the Secretary of Labor, not

[19] In addition, *Whitfield*, *Hendershott*, *Lowen*, and *Fink* were all decided after *Russell*, and the court in *Lowen* was aware of *Russell* when it embraced nonfiduciary liability (although it did not discuss *Russell* in that context). See *Lowen*, 829 F.2d at 1213.

[20] In addition, although the court did not consider OBRA, the Eleventh Circuit decided *Useden* following enactment of OBRA. Because that court held that ERISA recognizes no damage remedy against nonfiduciaries under Sections 502(a)(3) and (a)(5), 947 F.2d at 1581-1582, the conflict among the circuits is, in fact, widening—despite OBRA's clear implication that a right of action against nonfiduciaries is authorized by ERISA.

a plan beneficiary or participant. Br. in Opp. 14-15 & n.15. But as discussed, see p. 12, *supra*, Sections 502(a)(3) and (a)(5) codify identical rights to seek "appropriate equitable relief" to redress violations of ERISA's employee benefit rights provisions, and there is no reason to think that Congress intended to distinguish the kinds of relief available under the identical phrasing of the relevant provisions of those subsections. In any case, other conflicting decisions—such as *Lowen* and *Thornton*—were brought by private parties, and not the Secretary.

Second, respondent argues that *Hendershott* is not in conflict with the decision here because the requested relief —restitution of illegally obtained profits—is equitable in nature. Br. in Opp. 14-15. That purported distinction, however, ignores the fact that under traditional trust law, a remedy calculated to make the trust whole for losses arising from a fiduciary breach also arises in equity. See note 12, *supra*. Other decisions, moreover, have recognized nonfiduciary liability for monetary relief calculated to make an ERISA-covered plan whole. See, *e.g.*, *Whitfield*, 853 F.2d at 1302-1303; *Lowen*, 829 F.2d at 1212, 1220.

Third, respondent claims that the Second Circuit's decision in *Lowen* is consistent with Ninth Circuit precedent because the breach of fiduciary duty at issue in *Lowen* arose from party-in-interest transactions (829 F.2d at 1213-1218),[21] in violation of Section 406, 29 U.S.C. 1106,[22] and *Nieto* recognized a right to sue nonfiduciary parties in interest under Section 502(a)(3). See Br. in Opp. 15-16. It is true that the narrow holdings of *Lowen* and *Nieto* are consistent, but *Lowen* stands in contrast with *Nieto* to the extent that it broadly embraced "the principle that parties who knowingly par-

[21] *Hendershott* also arose from a party-in-interest transaction, although the court of appeals never addressed whether the nonfiduciary was himself a party in interest. See 840 F.2d at 342-343.

[22] Section 406, 29 U.S.C. 1106, prohibits a fiduciary from causing a plan and a party in interest to engage in specified transactions.

ticipate in fiduciary breaches may be liable under ERISA to the same extent as the fiduciaries." 829 F.2d at 1220. In any event, other decisions have recognized nonfiduciary liability in contexts other than prohibited transactions. See, *e.g.*, *Whitfield*, 853 F.2d at 1302-1303 (nonfiduciary attorney liable for the losses arising from knowing participation in plan trustee's acceptance of overvalued assets); *Thornton*, 692 F.2d at 1077-1078 (conversion of plan's funds).[23]

d. The issue of nonfiduciary liability under ERISA is of great importance to the enforcement of fiduciary requirements imposed by the statute. The Secretary of Labor has filed numerous actions against nonfiduciaries, seeking to compensate an employee benefit plan for losses resulting from a fiduciary breach in which a nonfiduciary knowingly participated. See, *e.g.*, *Whitfield* v. *Lindemann*, *supra*; *Dole* v. *Compton*, 753 F. Supp. 563, 564-565 (E.D. Pa. 1990); *Brock* v. *Gerace*, 635 F. Supp. 563 (D.N.J. 1986). Because there can be no assurance that fiduciaries will be able to provide complete relief to an ERISA-covered plan, see, *e.g.*, *Brock* v. *Gerace*, 635 F. Supp. at 569, recognition of nonfiduciary liability may in some circumstances provide the only means of making a plan whole. Accordingly, in view of the conflict among the circuits and the recurring nature of the question presented, further review of this important question is warranted.[24]

[23] Respondent also seeks to draw significance from the fact that the claim against it arose from its role as a service provider, performing statutorily mandated actuarial functions. See Br. in Opp. 15, 18. It is not clear, however, why that fact supports the court of appeals' determination that respondent is not liable for participating in a breach of fiduciary duty. If anything, there is greater reason to conclude that relief under Sections 502(a)(3) and (a)(5) should be broadly available where a nonfiduciary's knowing participation in a breach of fiduciary duty also involves the violation of statutory standards imposed upon the nonfiduciary.

[24] In *Klepak* v. *Dole*, 490 U.S. 1089 (1989) (No. 88-1271), the United States opposed a petition for certiorari presenting the issue raised here. Our opposition was premised in part on the view that

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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the Ninth Circuit, then the only court of appeals to reject non-fiduciary liability, would likely abandon its holding in *Nieto*. For the reasons set forth, see p. 17, *supra*, that is no longer likely to occur.

APPENDIX

ERISA § 409(a), 29 U.S.C. 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

ERISA § 502(a), 29 U.S.C. 1132(a), provides:

> **Persons empowered to bring a civil action**
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of his plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary, for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

ERISA § 502(*l*), 29 U.S.C. 1132(*l*) (Supp. II 1990), provides:

Civil penalties on violations by fiduciaries.

(1) In the case of (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—(A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—(A) the fiduciary or other person acted reasonably

and in good faith, or (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

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No. 91-1671

In The

Supreme Court of the United States

October Term, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

12/18/89	Complaint Filed.
03/07/90	Motion of Defendant Hewitt Associates to Dismiss Plaintiffs' Complaint Filed.
06/23/90	District Court Hearing On Defendant Hewitt's Motion To Dismiss.
08/10/90	Entry Of both the District Court's Memorandum And Order Dismissing Complaint And Cross-Claim in Mertens, et al. v. Hewitt Associates, et al., No. C-89-4475 MHP (N.D.Cal., Aug. 9, 1990) and Final Judgment.
08/25/90	Plaintiffs' Notice of Appeal Filed.
08/14/91	Argument Of Appeal Before The Ninth Circuit.
11/04/91	Ninth Circuit Opinion in Mertens, et al. v. Hewitt Associates, et al., 948 F.2d 607 (9th Cir., Nov. 4, 1991).
11/18/91	Plaintiffs-Appellants' Petition and Suggestion for Rehearing En Banc Filed.
12/16/91	Order Granting Secretary of Labor's Motion For Leave To File Its Brief Amicus Curiae in Mertens, et al. v. Hewitt Associates, et al., No. 90-16272 (9th Cir., Dec 16, 1991).
01/15/92	Order Denying Petition For Rehearing in Mertens, et al. v. Hewitt Associates, et al., No. 90-16272 (9th Cir., Jan 15, 1992).

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ, Plaintiffs, v. HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan, Defendants.	)	No. C 89 4475 COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MONETARY RELIEF UNDER ERISA (CLASS ACTION) (JURY TRIAL DEMANDED) [Filed 12/18/89]

I. JURISDICTION

1. This action for declaratory, injunctive and monetary relief is brought pursuant to § 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), and the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiffs also invoke the Court's pendent jurisdiction over their state law cause of action for professional negligence.

II. THE PARTIES

2. Plaintiff WILLIAM J. MERTENS resides in Concord, County of Contra Costa, State of California.

3. Plaintiff ALEX W. BANDROWSKI resides in Napa, County of Napa, State of California.

4. Plaintiff RUSSELL FRANZ resides in Upland, County of San Bernardino, State of California.

5. Plaintiffs, and each of them, are retired, former salaried employees of Kaiser Steel Corporation ("Kaiser"), a Delaware corporation. Each plaintiff is a "participant" (within the meaning of ERISA § 3(7), 29 U.S.C § 1002(7)) in the Kaiser Steel Retirement Plan ("PLAN"), a defined benefit pension plan established by Kaiser on or about 1977 which was terminated in October, 1986, by the PENSION BENEFIT GUARANTY CORPORATION ("PBGC") pursuant to the distress termination procedures of ERISA § 4041(c), 29 U.S.C. § 1341.

6. At all relevant times, defendant KAISER STEEL RETIREMENT PLAN ("PLAN") was a "defined benefit plan" within the meaning of ERISA § 3(35), 29 U.S.C.

§ 1002(35), and subject to the minimum funding standards imposed by ERISA § 302, 29 U.S.C. § 1082.

7. Upon information and belief, defendant HEWITT ASSOCIATES ("HEWITT") is a partnership established under the laws of the State of Illinois and doing business in the State of California. At all times relevant herein, HEWITT was an "enrolled actuary" within the meaning of ERISA § 3042, 29 U.S.C. § 1242, and regulations promulgated thereunder, and a "party-in-interest" as to the PLAN within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

8. Defendant PENSION BENEFIT GUARANTY CORPORATION ("PBGC") is a wholly-owned United States government corporation created by ERISA § 4002, 29 U.S.C. § 1302, to administer the pension plan termination insurance program established by Title IV of ERISA. PBGC is sued herein as a necessary party in its capacity as statutory trustee of the PLAN. Upon information and belief, there may arise a conflict between plaintiffs and defendant PBGC with respect to any monies recovered herein for the PLAN.

FACTS COMMON TO ALL CLAIMS

9. At all times relevant herein, HEWITT performed all actuarial work on behalf of the PLAN mandated by ERISA and regulations promulgated thereunder. Upon information and belief, Kaiser retained HEWITT on behalf of the PLAN and paid for its services.

10. Commencing in early 1980, Kaiser changed the basic nature of its business. The Company's radical

restructuring culminated in the curtailment and virtual elimination of its steel-making operations.

11. Among other effects, the change in the nature of Kaiser's business resulted in a substantial increase in the number of participants who retired from the Company with an entitlement to unreduced early retirement benefits under the terms of the PLAN.

12. The sharp increase in unreduced early retirements (and related events) imposed material increases in the PLAN's funding costs which were not reflected in the actuarial assumptions developed by HEWITT for the PLAN.

13. Nevertheless, throughout the period of the Company's radical transformation, HEWITT failed on an ongoing basis to change the actuarial assumptions so as to reflect the material increases in the PLAN's funding costs associated with the high number of early retirements.

14. Had HEWITT employed proper actuarial assumptions, then Kaiser would have been obligated to make substantially higher contributions in order to properly fund the PLAN.

15. Upon information and belief, HEWITT performed actuarial services for Kaiser at the same time that it performed services to the PLAN. Upon further information and belief, HEWITT's services to Kaiser related to its obligations to fund the PLAN.

16. Upon information and belief, at no time did HEWITT make full disclosure of its professional relationship with Kaiser, and any potential conflicts associated therewith, to the PLAN's fiduciaries or administrator.

17. Moreover, at no time did HEWITT disclose the material funding inadequacies and the implications thereof in any certificate or other writing which it was obligated to prepare on behalf of the PLAN.

18. As a consequence of HEWITT's acts and omissions, Kaiser failed to make the requisite contributions into the PLAN. The PLAN's assets became insufficient to satisfy its benefit commitments, including the commitments to pay plaintiffs and members of their class their fully vested pensions.

19. In October, 1986, the PBGC determined the PLAN to be severely underfunded and incapable of paying its liabilities, including the full early retirement monthly pension benefits owed to plaintiffs and other similarly situated PLAN participants and beneficiaries. Accordingly, pursuant to the distress termination procedures of ERISA § 4041(c), 29 U.S.C. § 1341, the PBGC terminated the PLAN and began paying plaintiffs and other PLAN participants and beneficiaries substantially reduced monthly pension benefits.

20. Upon termination of the PLAN, the PBGC became the statutory trustee of the PLAN pursuant to ERISA § 4042, 29 U.S.C. § 1342.

21. Before PBGC terminated the PLAN, plaintiff WILLIAM J. MERTENS received a monthly pension benefit in the amount of $2,016.00. Now, he receives only a $521.00 monthly pension benefit. Before the PLAN was terminated, plaintiff ALEX W. BANDROWSKI received $1,907.00 monthly, but now receives only $670.00 as a monthly pension. Plaintiff JAMES E. CLARKE previously received $2,567.00 monthly, but now receives only $1,103.00 as a monthly pension. Plaintiff RUSSELL FRANZ previously received $1,426.00 monthly, but now receives only $478.00 as a monthly pension.

22. As a result of the underfunding of the PLAN and its termination, plaintiffs and other similarly situated PLAN participants and beneficiaries all now receive substantially less than their entitlements to full early retirement pension benefits.

23. Information regarding the repeated meetings and other occasions when HEWITT's actuaries, employees and agents exercised defendant's fiduciary duties regarding the Kaiser Steel Retirement Plan, or could and should have exercised those duties, is particularly within the knowledge of HEWITT.

24. The acts, omissions and breaches of professional obligations to the PLAN as alleged herein include the ongoing failure of HEWITT to exercise due care, skill, prudence and diligence in employing actuarial methods and assumptions appropriate to the conditions created by the restructuring of Kaiser.

III. CLASS ACTION ALLEGATIONS

25. Plaintiffs bring this action on behalf of themselves and as a class action under the provisions of Rule

23 of the Federal Rules of Civil Procedure on behalf of all members of the class, defined as follows:

> All persons, other than defendants in *Mertens, et al. v. Kaiser Steel Retirement Plan, et al.*, Civil No. C-88-3587-MHP, who are, or have been, participants in or beneficiaries of the PLAN, and whose PLAN benefits were eliminated or reduced as a consequence of the acts and omissions alleged herein.

26. The requirements for maintaining this action as a class action under F.R.Civ.P. 23(a), (b)(1) and (b)(2), are satisfied in that:

(a) There are numerous class members who are participants or beneficiaries of the PLAN. Their exact number and identities are currently unknown to plaintiffs; but, upon information and belief, approximately 175 participants and beneficiaries constitute the class.

(b) The members of the class are so numerous that joinder of all members is impracticable.

(c) There are questions of law and fact common to the class, which questions relate to the existence and scope of defendants' duties, actions, and omissions herein alleged.

(d) Plaintiffs are members of said class; their claims are typical of the claims of the class members and they will fairly and adequately protect the interests of the class. The interests of plaintiffs are coincident with, and not adverse to, those of the remainder of the class. Plaintiffs are represented by attorneys who have specialized in ERISA litigation.

(e) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for HEWITT and a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

(f) HEWITT has acted, and refused to act, on grounds generally applicable to the class, thereby making appropriate final injunctive and other equitable relief with respect to the class as a whole.

FIRST ERISA CAUSE OF ACTION

[Breach Of Professional Duties to PLAN]

27. Plaintiffs incorporate Paragraphs 1 through 26 as though fully set forth herein.

28. As the PLAN's actuary, HEWITT was subject to the requirements imposed by ERISA, including:

A. ERISA § 302(c)(3), 29 U.S.C. § 1082(c)(3), which provides:

> For purposes of this part, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

B. ERISA § 103(a)(4)(B), 29 U.S.C. § 1023(a)(4)(B), which provides:

The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section –

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

C. ERISA § 103(d), 29 U.S.C. § 1023, which required, in relevant part:

(8) A statement by the enrolled actuary –

(A) that to the best of his knowledge the [actuarial] report is complete and accurate, and

(B) the requirements of section 302(c)(3) (relating to reasonable actuarial assumptions and methods) have been complied with.

* * *

(10) A statement by the enrolled actuary which discloses:

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future, but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.

* * *

(13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

29. In addition to the foregoing statutory requirements, HEWITT was at all times under an affirmative duty to adhere to regulations defining standards of performance of actuarial services as promulgated by the Joint Board for the Enrollment of Actuaries (JBEA), pursuant to its authority under ERISA § 3042, 29 U.S.C. § 1242.

30. The applicable JBEA regulations imposed *specific* standards of professional conduct on HEWITT, including:

(b) Professional duty. An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.

* * *

(d) Conflicts of interest. In any situation in which the enrolled actuary has a conflict of interest with respect to the performance of actuarial services, of which the enrolled actuary has knowledge, he/she shall not perform such actuarial services except after full disclosure has been made to plan trustees, any named fiduciary of the plan, the plan administrator, and, if the plan is subject to a collective bargaining

agreement, the collective bargaining representative.

(e) Assumptions, calculations and recommendations. The enrolled actuary shall exercise due care, skill, prudence and diligence to ensure that:

(1) The actuarial assumptions are reasonable in the aggregate and the actuarial cost method and the actuarial method of valuation of assets is appropriate.

(2) The calculations are accurately carried out, and

(3) The report, any recommendations to the plan administrator and any supplemental advice or explanation relative to the report reflect the results of the calculations.

(f) Report or certificate. An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed.

(ERISA Regs. § 901.20, 42 FR 39204.)

31. In addition, under IRS REG. § 1.412(c)(1)-1, HEWITT had a duty to the PLAN to choose actuarial assumptions appropriate to the funding method selected by Kaiser. HEWITT had no legal right to delegate that responsibility to Kaiser or to allow Kaiser to select or impose actuarial assumptions of its own choosing.

32. Nevertheless, upon information and belief, HEWITT either delegated the responsibility to Kaiser for

selecting the PLAN's actuarial assumptions or allowed Kaiser to impose its choice of assumptions. Upon further information and belief, HEWITT did so in order not to jeopardize its lucrative professional relationship with Kaiser.

33. By the acts and omissions described herein, HEWITT breached each of the foregoing ERISA provisions and applicable regulations relating to its professional obligations to the PLAN.

34. As a direct and proximate result, the PLAN became severely underfunded with the consequence that plaintiffs and their class have lost their fully earned vested retirement benefits.

35. Upon information and belief, HEWITT failed to employ proper actuarial assumptions so as to allow Kaiser to avoid paying higher contributions into the PLAN and in order to pursue its lucrative business relationship with Kaiser. Therefore, in committing the acts and omissions set forth herein, HEWITT acted intentionally, maliciously and/or with wanton indifference to the integrity of the PLAN and the rights of plaintiffs and their class, thereby justifying an award of punitive damages.

SECOND ERISA CAUSE OF ACTION

[Unlawful Party-In-Interest Transactions]

36. Plaintiffs incorporate paragraphs 1 through 26 and 28 through 35 as though fully set forth herein.

37. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(B), prohibits transactions involving a direct or indirect lending of money or other extension of credit between a plan and a party-in-interest.

38. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits transactions involving a direct or indirect furnishing of goods, services, or facilities between a plan and a party-in-interest.

39. ERISA § 408(b), 29 U.S.C. § 1108(b), exempts service providers to ERISA plans from the prohibitions of Section 406 " . . . if no more than reasonable compensation is paid . . . " for the services.

40. Because it breached its obligations, duties and responsibilities to the PLAN, failed to exercise due care, skill, prudence and diligence in the performance of its duties, and provided services to Kaiser in conflict to its obligations to the PLAN, HEWITT's compensation was not reasonable. Accordingly, by receiving compensation for the services it provided PLAN, HEWITT committed a prohibited transaction in violation of ERISA § 408.

PRAYER FOR RELIEF UNDER ERISA

WHEREFORE, on the First and Second Causes of Action, plaintiffs, pursuant to ERISA § 502(a)(3), pray that the Court:

A. Grant declaratory relief to the effect that HEWITT breached the duties, obligations and responsibilities imposed on it by ERISA and JBEA Regulations;

B. Declare that HEWITT failed to assure that the PLAN met the minimum funding standards imposed by ERISA § 302, 29 U.S.C. § 1082.

C. Grant judgment against HEWITT and order it to make good to the PLAN, plaintiffs and their class any and all losses to the PLAN resulting from its breaches of ERISA;

D. Grant judgment for punitive damages;

E. Grant judgment for pre-judgment interest;

F. Appoint a fiduciary for the PLAN to receive all funds restored by HEWITT and to distribute and/or pay benefits out of such restored funds to plaintiffs and their class;

G. Declare the respective rights of plaintiffs and their class and the defendant PBGC to any funds restored to the PLAN;

H. Grant judgment for the costs of suit herein and plaintiffs' attorneys' fees, pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g); and,

I. Grant such other and further legal and equitable relief as the Court deems appropriate.

THIRD CAUSE OF ACTION

(Professional Negligence Under California Law)

41. Plaintiffs incorporate Paragraphs 1 through 26 and 28 through 35 as though fully set forth herein.

42. During all relevant times, HEWITT has held itself out to the public and to the PLAN as a qualified enrolled actuary for ERISA-regulated employee benefit

plans, with the requisite degree of skill and knowledge necessary to assure that client-plans are maintained in compliance with all applicable law.

43. At all times relevant herein, HEWITT had an agreement whereby HEWITT, on a fee basis, agreed to perform and purported to perform all actuarial work on behalf of the PLAN mandated by ERISA and regulations promulgated thereunder.

44. By entering into the agreement described herein, HEWITT impliedly represented and warranted that in carrying out its responsibilities to the PLAN, it would use due care, skill, prudence and diligence. Said representation was made for the benefit of plaintiffs and their class in their capacities as the PLAN's participants and beneficiaries.

45. Nevertheless, HEWITT, in performing its actuarial services, failed to take into account the radical restructuring of Kaiser and related corporate events. Thus, HEWITT did not employ reasonable actuarial assumptions in the aggregate and, among other acts and omissions, failed to properly consider the impact on the PLAN's funding of the Company's radical restructuring.

46. Moreover, upon information and belief, HEWITT failed to advise the PLAN's fiduciaries of its employment by Kaiser and consequent conflict of interest regarding its services to the PLAN.

47. As a direct and proximate result of the HEWITT's professional malpractice as alleged herein, the PLAN became severely underfunded, thus preventing plaintiffs and other PLAN participants and beneficiaries

from receiving their fully earned vested retirement pension benefits.

48. In committing the acts and omissions set forth herein, HEWITT acted intentionally, maliciously and/or with wanton indifference to the rights of plaintiffs and other PLAN participants and beneficiaries, thereby justifying an award of punitive damages.

PRAYER FOR RELIEF REGARDING PENDENT STATE LAW CLAIM

WHEREFORE, plaintiffs prays:

A. For all damages according to proof;

B. For costs of suit incurred herein;

C. For punitive damages according to proof;

D. For such other and further relief as may be deemed just and proper.

Dated: December 18, 1989

Respectfully submitted,

SIGMAN & LEWIS

ANDREW THOMAS SINCLAIR

By: ____________________

Stephen Bingham

DEMAND FOR A JURY TRIAL

Plaintiffs hereby demand a jury trial as provided for in F.R.Civ.P. 38.

Dated: December 18, 1989

Respectfully submitted,

SIGMAN & LEWIS

ANDREW THOMAS SINCLAIR

By: ____________________

Stephen Bingham

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ,

Plaintiffs,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants.

No. C-89-4475-MHP

MEMORANDUM AND ORDER

Plaintiffs bring this action for declaratory, injunctive and monetary relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. and include a pendent state claim. The parties are now before the court on defendant Hewitt's motions [*sic*] dismiss the complaint and to dismiss a cross-claim under Federal Rule of Civil Procedure 12(b)(6).

BACKGROUND

Plaintiffs, former salaried employees of the Kaiser Steel Corporation, filed this action on December 18, 1989, alleging that Hewitt Associates ("Hewitt") had violated certain provisions of ERISA and California law while acting as actuary for the Kaiser Steel Retirement Plan

("Plan"). The court assumes the following allegations to be true, as it must for purposes of Hewitt's motion to dismiss.

Beginning in 1980, Kaiser radically restructured its business, ultimately curtailing and virtually eliminating its steel-making operations. Cplt. at 10. As a consequence of that curtailment, the number of employees who took early retirement, and were thus eligible for early retirement benefits, rose sharply. The early retirements, and related events resulted in significantly higher funding costs for the Plan which were not reflected in the actuarial assumptions employed by Hewitt.

Hewitt acted as actuary for the Plan from the Plan's inception in 1977 until the Plan was terminated in 1986. *Id.* at 3. Because of Hewitt's failure to alter its actuarial assumptions, Kaiser made substantially lower payments than necessary into the Plan. *Id.* at 4. Hewitt never disclosed those funding inadequacies in ERISA-prescribed documents or otherwise. *Id.* Hewitt also never disclosed that it was performing actuarial services for Kaiser at the same time as it performed those services for the Plan. *Id.*

In October 1986, the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation created under ERISA to administer the pension plan termination program, terminated the Plan after determining that the Plan was severely under-funded and incapable of paying its liabilities. *Id.* at 4-5. The PBGC is now the statutory trustee of the Plan. The retirement benefits of each of the plaintiffs and those similarly situated are considerably less under PBGC administration than those benefits to

which they were entitled before the Plan was terminated. *Id.* at 5.

The termination of the Plan has resulted in several lawsuits by Plan members, three of which have been instituted before this Court. In the present action, plaintiffs allege that Hewitt's actions were a breach of "professional duties" to the Plan created by ERISA, related regulations, and IRS regulations; that they constituted party-in-interest transactions in violation of ERISA section 406(a)(1), codified at 29 U.S.C. section 1106(a)(1); and that they constituted common law negligence. The PBGC and the Plan were named as defendants along with Hewitt.

Defendant Hewitt now enters motions for dismissal of the complaint and of the cross-claim of the PBGC.[1]

LEGAL STANDARD

A motion to dismiss will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning*

v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.), *cert. denied sub. nom. Wyoming Community Dev. Auth. v. Durning*, ___ U.S. ___, 108 S.Ct. 330 (1987).

DISCUSSION

Hewitt's motion to dismiss is based on several grounds. Defendant contends that the first and second counts of plaintiffs' complaint fail to state a claim upon which relief can be granted under ERISA. For count one, Hewitt maintains that no private right of action exists under ERISA for a so-called "breach of professional duties." For count two, Hewitt argues that plaintiffs have not properly alleged an unlawful party-in-interest transaction. Finally, Hewitt argues that the statute of limitations bars all claims. The court will take up each of these contentions in turn.[2]

I. The Viability of the ERISA Claim for Breach of Fiduciary Duty

The complaint includes no explicit count for breach of fiduciary duty, but the plaintiffs ask the court to read such a claim into it. They argue that count one can be construed as stating a valid claim for breach of fiduciary duty against Hewitt. Such a claim can only survive if Hewitt, the Plan actuary, is deemed a plan fiduciary. For present purposes, a plan fiduciary is one who:

> exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or one who] has any discretionary

> authority or discretionary responsibility in the administration of such plan.
>
> (29 U.S.C. § 1002(21)(A).)

Absent a showing that they have moved beyond the realm of their ordinary duties, actuaries, attorneys and accountants are not plan fiduciaries. *Yeseta v. Baima*, 837 F.2d 380, 385 & n. 2 (9th Cir. 1988) (finding attorney and accountant not to be fiduciaries where they exercised purely ministerial duties); 29 C.F.R. § 2509.75-5 (1986) (actuary not fiduciary unless exercised control over management of plan or plan's assets).

Plaintiffs argue that if Hewitt controlled or had the authority to control the setting of actuarial assumptions, then Hewitt was a fiduciary. They maintain that the complaint's allegations that Hewitt was responsible for employing and changing actuarial assumptions are sufficient to make Hewitt a fiduciary. That argument must fail. Actuaries are statutorily bound to employ actuarial assumptions in preparing statements for benefit plan annual reports. 29 U.S.C. § 1023(d)(8). Moreover, actuaries must re-evaluate and possibly change assumptions on at least an annual basis, since their written statements are required yearly. The performance of these statutorily-prescribed duties does not render actuaries fiduciaries.

Plaintiffs cite no cases finding an actuary to be a fiduciary. The authority that they do cite is either too general or simply inapposite. In *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980), the defendant found to be a fiduciary was a company which administered employee benefit plans. The court found that the company provided a range of administrative and management services

to the benefit plans at issue, including adjudicating medical claims, supervising a dental clinic and supervising the establishment of recordkeeping systems. "In each instance [the company] apparently possessed broad latitude in making awards, setting priorities, and performing other administrative tasks. . . . [The company] exercised far more than ministerial powers." *Id.* at 747. In the present case, by contrast, plaintiffs nowhere allege that Hewitt's role expanded beyond that of a typical actuary.[3] The other case plaintiffs principally rely upon for their argument that actuaries may be fiduciaries is also distinct from the present case. *Brock v. Self*, 632 F. Supp. 1509, 1520 (W.D. La. 1986) (pension plan servicing company, its executive officer and an employee all found to be fiduciaries because they rendered investment advice for a fee and exercised discretionary authority).

This court's decision that Hewitt's acts do not render it a fiduciary is supported by the few reported decisions directly on point. In *Associates in Adolescent Psychiatry v. Home Life Ins. Co.*, 729 F. Supp. 1162 (N.D. Ill. 1989), the court found that actuarial defendants who did nothing more than render professional services were not fiduciaries. Similarly, in the case at bar, taking all the complaint's allegations as true, Hewitt did nothing more than negligently perform actuarial services.[4] In *Pappas v. Buck*, 1989 U.S. Dist. LEXIS 14767, (N.D. Ill. Dec. 11, 1989), the defendant actuaries were accused of using the wrong yearly interest rate in computing their actuarial assumptions. The court stated:

> Defendants are accused only of giving faulty advice and professional services of a kind that do not involve exercising authority over the plan's assets. . . . We do not think that the rendering of professional actuarial advice alone can render one an ERISA fiduciary. *See, e.g., Painters of Philadelphia Dist. Council v. Price Waterhouse*, 879 F.2d 1146, 1149-50 (3d Cir. 1989) [public accountant's audit of ERISA fund did not render accountant a fiduciary].

Id. at 6. The complaint in this case only alleges that Hewitt improperly performed its actuarial duties. The allegations taken as a whole do not render Hewitt an ERISA fiduciary.

II. Viability of Claim for Knowing Participation in Breach of Fiduciary Duty

Plaintiffs also maintain that count one can be construed as alleging that Hewitt knowingly participated in breaches of fiduciary duties by Plan fiduciaries. Plaintiffs concede that the Ninth Circuit has explicitly ruled that no right of action exists under ERISA for damages against a non-fiduciary. *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1988) (reaffirmed in *Call v. Sumitomo Bank*, 881 F.2d 626, 634 (9th Cir. 1989)). However, they argue that passage of the Omnibus Revenue Reconciliation Act in 1989 clarified Congress' intent to allow such actions. They contend that the amendments to ERISA codified at 29 U.S.C. section 1132(l), which require the Secretary of Labor to levy civil penalties against those who knowingly participate in breaches of fiduciary duty, demonstrate that Congress intended such individuals to be liable under 29 U.S.C. section 1109 all along.

This court will not engage in creative rewriting of the statute or of current Ninth Circuit law by which it remains bound. The Ninth Circuit has clearly rejected aider and abettor or other non-fiduciary liability under section 1109.

III. Viability of Claim for Breach of Actuarial Duties

Plaintiffs also allege in their first cause of action that Hewitt breached professional duties imposed upon it by ERISA statutes and regulations and by Internal Revenue Service regulations.[5]

Plaintiffs concede, as they must, that their only viable avenue for redress of ERISA violations committed by a non-fiduciary is through a claim for equitable relief under 29 U.S.C. section 1132(a)(3).[6] *Nieto*, 845 F.2d at 874. Plaintiffs' prayer for relief asks for an order that Hewitt "make good to the Plan, plaintiffs and their class any and all losses to the Plan resulting from its breaches of ERISA." Cplt. at 12. Plaintiffs classify this as a prayer for restitutionary relief.[7] Opp. Mem. at 23.

Few reported cases have considered the availability of restitutionary relief under section 1132(a)(3). The parties have cited none. In the only reported appellate case on point, *United States Steel Mining Co. v. District 17 United Mine Workers*, 897 F.2d 149 (4th Cir. 1990), a company and its pension fund sought to recover benefits wrongly paid to employees in compliance with a state court injunction which was later invalidated. The defendants were the state court judge, the employee union and its members. The Fourth Circuit ruled that it was inappropriate for a federal court to grant relief under the circumstances because: 1) the damages sought were extra-contractual, in contradiction of the dictates of *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) and 2) the state court which issued the injunction was the best forum for relief. *United States Steel Mining Co.*, 897 F.2d at 153. In its denial of restitutionary relief for

the case before it, the court rendered no opinion on the availability of such relief under section 1132(a)(3) in general.

Three district court cases have considered the issue before the court. In *Bartz v. Carter*, 709 F. Supp. 827 (N.D. Ill. 1989) the plaintiffs sought restitution from trustees who allegedly converted a profit sharing plan into an employee stock ownership plan and gained control of the company, resulting in a substantial reduction in the value of plan assets. The court denied a motion to dismiss the claim, ruling that it was properly brought under section 1132(a)(3)(B)(ii). Although this court disagrees and considers such a claim properly brought under section 1132(a)(2) instead, the *Bartz* decision still serves as an example of judicial recognition of the restitutionary remedy under section 1132.

Further recognition of the remedy occurred in *Rochetti v. American Fed'n. of Musicians' and Employers' Pension Welfare Fund*, 1987 W.L. 12767 (N.D. Ill. Aug. 13, 1987) and *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980). In *Rochetti* musicians sought to recover payments made on their behalf into a benefits fund. They alleged that the payments violated the Labor Management Relations Act. The court recognized that restitution was an equitable remedy contemplated by section 1132(a)(3), but denied it to the plaintiffs because they did not seek to redress violations of ERISA.

In *Bittner*, the plaintiff alleged that he had been dismissed in retaliation for exercising his right to ERISA benefits. He sought back pay and reinstatement. In denying the defendant's motion to dismiss, the court observed

that section 1132(a)(3) authorized equitable relief and stated, "[c]hief among the equitable remedies is the remedy of restitution." *Id.* at 536.

The above cases provide sufficient support for this court to grant restitutionary relief under section 1132(a)(3), in appropriate circumstances. However, the case at bar does not present such circumstances. Restitutionary relief must be predicated on some unjust enrichment. "[R]estitution is generally awarded when the defendant has gained a benefit that it would be unjust for him to keep. . . . " Dobbs *Remedies*, § 4.1 at 224 (West 1978). In the case at bar there are no allegations that Hewitt's purported violations have resulted in any benefit beyond its normal compensation as an actuary.

That is not to say that no protections are available against actuaries who violate ERISA without profiting from their malfeasance. Timely injunctive relief is available under sections 1132(a)(3) and (a)(5). Moreover, relief is also available through the Joint Board for Enrollment of Actuaries who may suspend or terminate an offending actuary's right to provide services to ERISA plans. 29 U.S.C. § 1242(b).

Because no claim exists on the alleged facts for breach of fiduciary duty, for knowing participation in breach of fiduciary duty, or for breach of "professional duties," the first cause of action in this case is dismissed.

IV. Viability of Claim for Unlawful Party-In-Interest Transactions

As a general rule, a claim under section 1132(a)(3) can be made for violations of the prohibited transaction sections of ERISA. *Nieto*, 845 F.2d at 873-74. Plaintiffs allege such a violation as follows in their second cause of action:

> Because it breached its obligations, duties and responsibilities to the PLAN, failed to exercise due care, skill, prudence and diligence in the performance of its duties, and provided services to Kaiser in conflict to its obligations to the PLAN, HEWITT's compensation was not reasonable. Accordingly, by receiving compensation for the services it provided PLAN, HEWITT committed a prohibited transaction in violation of ERISA § 408 [sic] [406 intended].

(Cplt. para. 40.)

Plaintiffs attempt to bootstrap a right to relief for commission of prohibited transactions based on a separate claim for violation of actuarial duties. The second cause of action is redundant. The violation of actuarial duties was alleged in count one. That violation cannot fairly be held to have rendered Hewitt's acceptance of otherwise reasonable compensation an additional actionable claim. Under the plaintiffs' scheme, any time a service provider was liable for an ERISA violation, both the provider and otherwise blameless plan fiduciaries would be liable for engaging in a prohibited transaction if the fiduciaries paid the negligent provider. Nothing in ERISA suggests such far-flung remedies.

Plaintiffs' reliance on *Nieto* is unavailing. The attorney defendant in *Nieto* allegedly was paid for services he never rendered, as opposed to being paid for services negligently rendered. *Id.* at 870. The excess compensation was thus the basis for a valid claim of engaging in a prohibited transaction.

The plaintiffs' prohibited transaction claim is flawed for an additional reason. A prohibited transaction requires wrongful receipt of plan assets. 29 U.S.C. § 1106. The complaint alleges that Hewitt was paid for its services by Kaiser Steel, not by the Plan. Cplt. at para. 9. Thus, there was no prohibited transaction between Hewitt and the Plan within the meaning of section 1106. Plaintiffs' attempt at oral argument to tie the Plan to the source of funds for Hewitt's payment was nothing more than conjecture. Plaintiffs have failed to state a claim under ERISA for count two of the complaint and the count is dismissed.

V. Viability of Pendent Professional Negligence Claim

Plaintiffs concede that their third cause of action for professional negligence under state law is governed by the two-year statute of limitations of California Code of Civil Procedure section 339.1. Therefore, only those wrongful acts occurring in the two years prior to the filing of the suit on December 18, 1989 are actionable, unless tolling applies.

Plaintiffs contend that the statute did not begin to run until after commencement of discovery in the related case of *Mertens v. Kaiser Steel Retirement Plan*, No. C-88-3587-MHP (N.D. Cal), which was filed in September 1988. They maintain that until then there was no "notice or information of circumstances to put a reasonable person on inquiry," *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103 (1988). They also cite other bases for tolling. *April Enterprises v. KTTV*, 147 Cal. App. 3d 805, 831 (1983) (statute tolled where the injury or the act causing injury has been difficult to discover); *Bedolla v. Logan & Frazer*, 52 Cal. App. 3d 118, 125 (1975) (statute tolled until wrongful acts are discovered or with reasonable diligence could have been discovered).

The defendant argues that the statute began running at the time when the PBGC terminated the Plan after determining that it was "severely underfunded and incapable of paying its liabilities." Cplt. para. 19. They maintain that, since the PBGC made a determination of underfunding and terminated the Plan in October 1986, the plaintiffs then knew or should have known of the Plan's funding inadequacies. They contend that, in any event, once plaintiffs began receiving reduced benefits checks they were on notice of the need to discover the facts underlying the Plan's termination.

The court agrees with defendant. The allegations in the complaint regarding the termination of the Plan in October 1986 due to underfunding establish that the statutory period commenced at that time. Since the action was not filed until December 1989, the negligence claim is barred.

CONCLUSION

For the foregoing reasons, the court GRANTS defendant Hewitt's motion for dismissal of the complaint in its

entirety. All federal claims in the complaint are DISMISSED for failure to state claims upon which relief may be granted. The statute of limitations has run on the pendent law state claim and it, too, is DISMISSED. The court also GRANTS defendant Hewitt's motion for dismissal of the PBGC's cross-claim. Since the cross-claim is derivative of the fatally defective complaint, the cross-claim is DISMISSED.

Although defendant Hewitt's motion was not brought on behalf of the other two defendants, since no distinct allegations were directed against them, the PBGC and the Plan are also DISMISSED from the action.

IT IS SO ORDERED.

Dated: August 9, 1990

/s/ ____________________
MARILYN HALL PATEL
United States District Judge

ENDNOTES

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[1] In reference to the motion to dismiss the cross-claim of the PBGC, Hewitt argues, and the PBGC concedes, that the cross-claim must rise or fall with the complaint. Hewitt's arguments on its motion to dismiss are thus aimed at both the complaint and the cross-claim. Rather than file a memorandum rebutting Hewitt's arguments, the PBGC has joined in the plaintiffs' opposition to Hewitt's motion.

[2] The resolution of the motion on substantive grounds renders it unnecessary for the court to consider the statute of limitations arguments.

[3] Plaintiffs do allege, at paragraph 23 of the complaint, that "[i]nformation regarding the repeated meetings and other occasions when [Hewitt] . . . exercised defendant's fiduciary duties regarding [the Plan], or could and should have exercised those duties, is particularly within the knowledge of Hewitt." Complaint at para. 23. Plaintiffs apparently believe that they are thus freed from any responsibility to make more specific allegations of misconduct by Hewitt, pending discovery. However, the allegation that Hewitt knows more about what happened in meetings related to its actuarial duties than do the plaintiffs adds nothing. The court will not accept the notion that, because the plaintiffs do not know the specifics of Hewitt's activities, one can assume that those activities give rise to a fiduciary relationship.

[4] Plaintiffs argue that the complaint also alleges that Hewitt acted in collusion with Kaiser. They cite no specific paragraph for this allegation and the court finds it nowhere. The closest allegation would appear to be paragraph 32 where plaintiffs allege that Hewitt either delegated the responsibility for selecting the Plan's actuarial assumptions to Kaiser or allowed Kaiser to do so "in order not to jeopardize its lucrative professional relationship with Kaiser." Cplt. at para. 32. From this allegation one cannot reasonably infer collusion with Kaiser, one can at most infer profit maximizing or perhaps greed on Hewitt's part.

[5] The statutory duties referred to are set out at 29 U.S.C. sections 1023(a)(4)(B); 1023(d)(8), (10) and (13); and 1082(c)(3). The pertinent ERISA regulations, established by the Joint Board for Enrollment of Actuaries pursuant to 29 U.S.C. section 1242, are set out in 29 C.F.R. section 901.2. The I.R.S. regulations at issue are codified at 31 C.F.R. section 10.0 et seq.

[6] On this point, the parties strive mightily against nonexistent targets. The defendant employs the factors of *Cort v. Ash*, 422 U.S. 66 (1975), to argue at length concerning the unavailability under ERISA of a private cause of action for damages against a non-fiduciary. Plaintiffs' belated concession renders that argument unnecessary. More curiously, the plaintiffs also apply *Cort v. Ash* to argue in favor of a cause of action already granted to them by statute.

[7] Since the Plan was terminated long ago, and with it Hewitt's role as plan actuary, obviously injunctive relief is irrelevant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ,

Plaintiffs,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants.

No. C-89-4475-MHP

JUDGMENT
Fed.R.Civ.P. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed herein dismissing all claims,

IT IS ORDERED AND ADJUDGED that plaintiffs' complaint is DISMISSED as to all defendants, the Pension Benefit Guaranty Corporation's cross-claim is DISMISSED and this action is DISMISSED in its entirety.

IT IS SO ORDERED.

Dated: August 9, 1990

/s/
MARILYN HALL PATEL
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees.

No. 90-16272

D.C. No. CV-89-4475-MHP

OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
August 14, 1991 - Pasadena, California
Filed November 4, 1991

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*
Opinion by Judge Thompson

Plaintiffs, former employees of Kaiser Steel Corporation ("Kaiser") and participants in its ERISA qualified

* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

pension plan, brought this action against the plan's actuary, Hewitt Associates ("Hewitt"), for ERISA-based and pendent state claims. The district court dismissed all of the plaintiffs' claims and entered judgment in favor of Hewitt. We affirm the district court's dismissal of the ERISA-based claims, but reverse its dismissal of the pendent state law claim.

FACTS

On a motion to dismiss, all material allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff. *Call v. Sumitomo Bank*, 881 F.2d 626, 630 (9th Cir. 1989). With this in mind, we state the following facts as alleged by the plaintiffs and take these facts as true for the purpose of deciding this appeal.

According to the plaintiffs, Kaiser hired Hewitt to perform actuarial work for its ERISA plan. Early in 1980, Kaiser restructured its business operations and virtually eliminated its steel-making operations. As a result, the number of employees retiring from the company who were entitled to early retirement benefits under the plan increased significantly, as did the plan's funding costs.

The actuarial assumptions Hewitt had developed previously for the plan did not reflect the increased costs, and Hewitt did not change its assumptions to reflect the increase. Rather, Hewitt delegated the responsibility for selecting actuarial assumptions to Kaiser.

According to the plaintiffs, Hewitt's conduct was improper. Had Hewitt employed proper actuarial

assumptions, Kaiser would have had to make substantially higher contributions to the plan. Hewitt failed to disclose this funding inadequacy in any certificate or other writing which it prepared on behalf of the plan. As a consequence of Hewitt's acts and omissions, Kaiser failed to fund the plan adequately, and the plan's assets became insufficient to satisfy benefit commitments, including the commitment to pay the plaintiffs their fully vested pensions.

The plaintiffs further alleged that at the same time Hewitt was performing services for the plan, it was also providing actuarial services to Kaiser. Hewitt did not want to jeopardize this lucrative professional relationship. Hewitt failed to disclose to plan administrators its relationship with Kaiser and the potential conflict that the relationship created.

In October 1986,[1] the Pension Benefit Guaranty Corporation ("PBGC") determined that the plan was underfunded and incapable of paying its liabilities, including the pension benefits owed to the plaintiffs. As a result of the underfunding, the PBGC terminated the plan and began paying the plaintiffs and other plan participants substantially reduced benefits. For example, one plaintiff's monthly check was reduced from $2,016 to $521. Other plaintiffs suffered comparable reductions.

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[1] The appellants' opening brief stated that the 1986 date in the complaint is incorrect, and that the PBGC actually terminated the plan in February 1987. The resolution of this question is irrelevant to the outcome of this appeal. *See infra* note 10.

The plaintiffs' complaint alleged three causes of action: a cause of action based on ERISA for "breach of professional duties to the plan;" a cause of action based on ERISA for "unlawful party-in-interest transactions;" and a professional malpractice claim under California law. The PBGC answered and filed a cross-claim in which it asserted that any recovery by the plaintiffs should be paid to it.

Hewitt filed a motion to dismiss the plaintiffs' complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It argued that the entire complaint was barred by the statute of limitations and also that the ERISA claims were insufficient as a matter of law.

In their response to the motion, the plaintiffs asserted that their first claim actually stated three independent claims under ERISA: a claim for breach of fiduciary duty; a claim for knowing participation in a breach of fiduciary duty; and a claim for non-fiduciary breach of actuarial duties. They stood by their remaining claims.

In its order granting the motion to dismiss, the district court determined that the ERISA claims were insufficient as a matter of law. The court also held that the pendent state claim was barred by the applicable California limitation period. It dismissed the PBGC's claim as derivative. The plaintiffs did not seek leave to amend their complaint, and this appeal followed.[2]

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[2] The plaintiffs have not appealed dismissal of their ERISA claim for "unlawful party-in-interest transactions."

DISCUSSION

A. *Claim for Breach of Fiduciary Duty*

An ERISA fiduciary includes anyone who exercises discretionary authority over the plan's management, anyone who exercises authority over the management of its assets, and anyone having discretionary authority or responsibility in the plan's administration. 29 U.S.C. § 1002(21)(A);[3] *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987). A party "rendering professional services to a plan is not a fiduciary so long as he does not exercise any authority over the plan 'in a manner other than by usual professional functions.'" *Nieto v. Ecker*, 845 F.2d 868, 870 (9th Cir. 1988), quoting *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988).

The district court held that the complaint failed to state a claim for breach of fiduciary duty because nothing in the complaint indicated that Hewitt had done anything other than render actuarial services to the plan. Further,

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[3] 29 U.S.C. § 1002(21)(A) provides in relevant part:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

nothing in the complaint indicated that Hewitt exercised control or authority over plan assets. Although the plaintiffs allege that Hewitt acted negligently, fraudulently, and reprehensibly as an actuary, no inference can be made from the complaint that Hewitt acted in any capacity other than as an actuary.

Although the courts have recognized the possibility that professional service providers can be liable as ERISA fiduciaries, they consistently have found attempts to assert liability on that basis unavailing. For example, the *Nieto* court affirmed the district court's dismissal of a claim against an attorney who allegedly rendered services to an ERISA plan in an improper and fraudulent manner. Because the complaint did not allege that the attorney had authority over plan assets, the court rejected the argument that he was an ERISA fiduciary, even though his dishonesty may have led to the dissipation of plan assets. 845 F.2d at 870-71; *see also Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535-38 (7th Cir. 1991) (actuary was not fiduciary where there was no allegation that it had "actual decision-making power"); *Yeseta v. Baima*, 837 F.2d 380, 384-85 (9th Cir. 1988) (attorney and accountant who did not exercise actual control over management of plan not fiduciaries); 29 C.F.R. § 2509, 75-5 (1990) (actuary not fiduciary solely by virtue of rendering services to plan).

In their brief, the plaintiffs rely primarily on *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984). In *Monson*, the court upheld a district court's finding of liability for breach of fiduciary duties against the general manager of a plan sponsor. The district court noted that the manager had worked on relevant amendments to the plan, had consulted on the plan's behalf with independent experts regarding plan investments, had authority to issue press releases on behalf of the plan, and was responsible for informing employees about the plan. *Id.*

Monson is easily distinguishable from this case. Unlike the general manager in *Monson*, Hewitt was an independent actuary, not part of the plan sponsor's control group. Also, unlike the facts in *Monson*, the plaintiffs' allegations do not indicate that Hewitt had any control over the plan's operation or administration.

We conclude the district court correctly held that the plaintiffs' allegations failed to state a claim for breach of fiduciary duty under ERISA.

B. *Claim for Knowing Participation in Breach of Fiduciary Duty*

The plaintiffs argue that even if Hewitt is not a fiduciary, it still may be liable under ERISA if it knowingly participated in another's breach of fiduciary duty.

ERISA provides that any person who is a fiduciary to a plan who breaches any duty imposed by the statute is personally liable to the plan. 29 U.S.C. § 1109(a).[4] ERISA's

[4] Section 1109(a) provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of

civil enforcement section provides that a civil action may be brought by the Secretary or by a plan participant, beneficiary, or fiduciary for relief under section 1109. 29 U.S.C. § 1132(a)(2).[5]

In *Nieto*, we held that the plain language of section 1109(a) "limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable under that section." 845 F.2d at 871. We rejected the argument that a non-fiduciary could be liable under this section for knowing participation in a breach of fiduciary duty. *Id.*[6]

Plaintiffs contend that we can and should overrule *Nieto* because Congress' enactment of the Omnibus Revenue Reconciliation Act of 1989 and its addition of a new enforcement provision to ERISA, 29 U.S.C. § 1132(l),[7]

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assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

[5] Section 1132 provides in relevant part:

(a) A civil action may be brought –

. . .

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title . . .

[6] We subsequently followed *Nieto* in *Call v. Sumitomo Bank*, 881 F.2d at 634-35.

[7] Section 1132(l) provides in relevant part:

(l) In the case of –

(A) any breach of fiduciary responsibility . . . or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil

clarified Congress' intent to permit suits for knowing participation in a breach of fiduciary duty. Section 1132(l) gives the Secretary of Labor the power to assess a civil penalty against fiduciaries or other persons in certain amounts based upon any "knowing participation" in such a breach of fiduciary duty. The plaintiffs note that section 1132(l) refers to judicial proceedings brought by the Secretary under sections 1132(a)(2) or (a)(5). Section 1132(a)(2) in turn allows both the Secretary and plan participants to bring civil actions. The plaintiffs therefore conclude that because Congress in section 1132(l) gave the Secretary the ability to bring an action against non-fiduciary assistants under 1132(a)(2), it implicitly gave plan participants the same ability.

We reject this argument. The plain language of section 1132(l) applies to the Secretary only, not to plan participants. "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1984), quoting *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979); *see also Nieto*, 845 F.2d at 872.

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penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (l), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach . . .

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

In drafting the ERISA amendments in 1989, Congress considered but rejected an amendment to overrule our decision in *Nieto*. H.R. Rep. No. 101-247, 101st Cong., 1st Sess. 77-78, *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 1969-70. We decline to do what Congress has refused to do.

C. Claim for Non-Fiduciary Violations of ERISA

The plaintiffs also argue that their first cause of action states a claim under 29 U.S.C. § 1132(a)(3), which provides that plan participants may seek equitable relief to redress violations of ERISA.[8] By this claim, the plaintiffs sought a recovery of money from Hewitt for its alleged improper acts.

The only way the district court could fashion an equitable remedy under ERISA to provide a monetary recovery for the plaintiffs against Hewitt would be to order restitution. The district court dismissed this claim, however, because the plaintiffs had not alleged that Hewitt received anything other than its compensation for actuarial services. We agree with this analysis. Restitution was not available because unjust enrichment to support the plaintiffs' claim was not alleged.

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[8] Section 1132(a)(3) provides in relevant part:
A civil action may be brought –

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Moreover, restitution requires that there be a direct link between the loss complained of and the recovery sought. *See Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 949-50 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976) (to make out a claim for restitution "it is usually necessary for the plaintiff to show that he conferred the benefit"). Here, no such link exists. The plaintiffs allege that Hewitt was paid by Kaiser, not from assets of the plan. It is not possible, therefore, to frame a claim for restitution in terms of the recovery of plan assets wrongfully obtained by Hewitt. *See United States ex rel. Youngstown Welding and Eng'g Co. v. Travelers Indem. Co.*, 802 F.2d 1164, 1169 (9th Cir. 1986) (party who is not source of unjust enrichment is not entitled to restitution under Arizona law).

The plaintiffs argue that to the extent Kaiser was paying Hewitt, it was doing so as remuneration for breach of Hewitt's statutory duty and that all payments received by Hewitt were thus "unjust enrichment." The plaintiffs, however, have provided no authority that supports this theory. Moreover, to accept the plaintiffs' argument would be to obliterate the already blurry distinction between restitution and damages at law. Given that ERISA explicitly limits claims pursuant to subsection (a)(3) to claims for equitable relief, such an expansion would appear contrary to the spirit of the statute. *See Nieto*, 845 F.2d at 873 (permitting recovery of damages under subsection (a)(3) would render subsection (a)(2) superfluous, "a result contrary to a fundamental cannon of statutory construction").[9]

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[9] Even under this somewhat circuitous theory of unjust enrichment, the plaintiffs failed to allege Hewitt obtained anything from the plan.

We conclude that the district court did not err in dismissing the plaintiffs' non-fiduciary ERISA claim for restitution.

D. Pendent California Professional Malpractice Claim

The district court dismissed the plaintiffs' pendent professional negligence claim as time barred. The parties agree that California Code of Civil Procedure § 339(1), the two-year statute of limitations for professional malpractice claims, governs this pendent claim. The dispute is over when the claim accrued.

In California, the statute of limitations for a professional malpractice claim begins to run upon the occurrence of the last fact essential to the cause of action. "The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive the plaintiffs of a cause of action before they are aware that they have been injured." *Leaf v. City of San Mateo,* 104 Cal.App.3d 398, 406, 163 Cal.Rptr. 711, 715 (1980). This is generally known as the "discovery rule."

Where the "discovery rule" applies, "the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." *Jolly v. Eli Lilly & Co.,* 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 568, 661 (1988) (citation and footnote omitted). California courts have applied the discovery rule to professional malpractice cases. *See Neel v. Magana, Olney, Levy, Cathcart & Gelfand,* 6 Cal.3d 176, 98

Cal.Rptr. 837 (1971) (attorney malpractice); *Moonie v. Lynch,* 256 Cal.App.2d 361, 64 Cal.Rptr. 55 (1967) (accountant malpractice).

Hewitt does not contest that the discovery rule applies here. Rather it argues that the plaintiffs should have discovered Hewitt's alleged wrongs in 1986, when the plan failed.[10] It argues that the plaintiffs had access to plan reports that would have alerted them to any actuarial improprieties. It asserts that certainly when the plan failed, the plaintiffs were on notice and should have obtained the reports that would have alerted them to the funding problems.

Hewitt's argument fails under California law. "[T]he question of when there has been a belated discovery of the cause of action, especially in malpractice cases, is essentially a question of fact . . . [and] [i]t is only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law." *Brown v. Bleiberg,* 32 Cal.3d 426, 436, 186 Cal.Rptr. 228, 233 (1982).

In *Baright v. Willis,* 151 Cal.App.3d 303, 198 Cal.Rptr. 510 (1984), the court refused to sustain a demurrer in a

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[10] The plaintiffs' complaint alleged that "[i]n October, 1986, the PBGC determined the PLAN to be severely underfunded and incapable of paying its liabilities, including the full early retirement monthly pension benefits owed to the plaintiffs and other similarly situated PLAN participants and beneficiaries."

Even if, as the plaintiffs now claim, the PBGC made the determination in February 1987, the result is the same – the complaint was not filed until December 1989, two years and nine months after the later date.

professional negligence case where the plaintiff's complaint did not show on its face that "in the exercise of due diligence plaintiff should have earlier discovered respondent's alleged negligence and failed to do so." 151 Cal.App.3d at 311, 191 Cal.Rptr. at 514-15. A demurrer on statute of limitations grounds is improper "where the complaint merely shows that the action may have been barred. It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred." 151 Cal.App.3d, at 311, 191 Cal.Rptr. at 514, quoting *Vassere v. Joerger,* 10 Cal.2d 689, 693, 76 P.2d 656, 653 [*sic*] (1938).

In the present case, the complaint does not show on its face that the plaintiffs should have discovered Hewitt's alleged negligence when the PBGC determined the plan to be severely underfunded and incapable of paying its liabilities. The PBGC may terminate a plan for a variety of reasons not premised on wrongdoing by either the plan fiduciaries or the plan's enrolled actuary. *See* 29 U.S.C. § 1342(a). *See also Pension Benefit Guaranty Corp. v. LTV Corp.,* ___ U.S. ___, 110 S.Ct. 2668, 2672-73 (1990) (plan sponsor entering bankruptcy). Reasonable minds can draw more than one conclusion from the circumstance of underfunding.

Thus, we reverse the district court's dismissal of the pendent state claim as barred by the applicable statute of limitations. The complaint does not show on its face that the plaintiffs were placed on a discovery inquiry as to Hewitt's alleged professional malpractice more than two years before the complaint was filed. On remand, the district court has discretion to allow the plaintiffs to

pursue the pendent claim or to dismiss it. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966).

CONCLUSION

The district court's dismissal of the ERISA-based claims is affirmed. The district court's dismissal of the pendent state claim is reversed and remanded.

AFFIRMED in part, **REVERSED** in part and **REMANDED.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees.

No. 90-16272

D.C. No. C-89-4475-MHP

ORDER

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*

The Secretary of Labor's Motion for Leave to File its Brief Amicus Curiae is granted. The brief, received by the clerk on November 18, 1991, is ordered filed.

* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

UNITED STATES COURT OF APPEALS
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D.C. No. C-89-4475-MHP

ORDER

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Norris and Thompson have voted to reject the suggestion for rehearing en banc, and Judge King has so recommended.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35 (b).

* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

No. 91-1671

In The

Supreme Court of the United States

October Term, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a nonfiduciary who knowingly participates in a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 is liable for losses that an employee benefit plan sustains as a result of the breach.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the petitioners sued two other parties: the Kaiser Steel Retirement Plan ("Plan"), and the Pension Benefit Guaranty Corporation ("PBGC"), which had terminated the Plan pursuant to ERISA's distress termination provisions. Petitioners sued the PBGC in its capacity as the Plan's statutory trustee. The PBGC answered and filed a cross-claim in which it asserted that any recovery by the plaintiffs should be paid to it. The district court granted Hewitt's motion for dismissal of the PBGC's cross-claim as "derivative" of the complaint. *Sua sponte,* the district court also dismissed the Plan and the PBGC "since no distinct allegations were directed against them. . . . " (J.A. 32). The PBGC did not appeal on behalf of the Plan or itself as the statutory trustee.

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**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 948 F.2d 607, and is reprinted in the Joint Appendix at pp. 35-49.

The memorandum decision of the United States District Court for the Northern District of California (Patel, D.J.) has not been reported. It is reprinted in the Joint Appendix at pp. 19-33.

JURISDICTION

On January 15, 1992, the court of appeals denied a timely petition for rehearing (J.A. 50), after first granting the Secretary of Labor's Motion for Leave to File her Brief Amicus Curiae in support of rehearing *en banc.* (J.A. 51). On April 14, 1992, petitioners filed a petition for a writ of certiorari which was granted by this Court on October 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 409(a), 29 U.S.C. § 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

ERISA § 502(a), 29 U.S.C. § 1132(a), provides in relevant part:

> A civil action may be brought –
>
> (1) * * *

> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violated any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;
>
> (4) * * *
>
> (5) * * * by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate relief (i) to redress such violation or (ii) to enforce any provision of this title;
>
> (6) * * *

ERISA § 502(*l*), 29 U.S.C. § 1132(*l*) provides:

> (1) In the case of (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount..
>
> (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) – (A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such

fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that (A) the fiduciary or other person acted reasonably and in good faith, or (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986.

STATEMENT OF THE CASE

The court of appeals in this case held that ERISA does not afford pension plan participants a cause of action against the plan's actuary for knowingly participating in breaches of fiduciary duty committed by the plan's fiduciaries which resulted in the distress termination of the severely underfunded plan. The court's decision, consistent with its earlier opinion in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), conflicts directly with the reported decisions of the Second, Sixth, Seventh, and District of Columbia Circuit Courts of Appeals. All of these courts have recognized the liability under ERISA of non-fiduciaries who knowingly participate in a fiduciary breach. Only the Eleventh Circuit Court of Appeals agrees with the Ninth Circuit in refusing to recognize non-fiduciary liability under ERISA for aiders and abetters of ERISA fiduciary breaches.

Upon taking over the Kaiser Steel Pension Plan pursuant to ERISA's distress termination provision, 29 U.S.C. § 1341, the PBGC stated through its Executive Director that "[t]he company's funding of the plan was grossly inadequate to pay the benefits promised . . . . " (*BNA Pension Reporter*, p. A-5, March 11, 1987). As a result of the Plan's "gross" underfunding, the petitioners, all long-term Kaiser Steel Company ("Kaiser") management employees, suffered substantial reductions in their monthly pension benefits.[1]

The court of appeals opinion sets forth plaintiffs' allegations against defendant, Hewitt Associates ("Hewitt"), the actuary for Kaiser, which it accepted as true in reviewing the district court's dismissal of the action against Hewitt pursuant to F.R.Civ.P. 12(b)(6):

> . . . Kaiser hired Hewitt to perform actuarial work for its ERISA plan. Early in 1980, Kaiser restructured its business operations and virtually eliminated its steel-making operations. As a result, the number of employees retiring

[1] Petitioner Mertens suffered a reduction in his monthly pension from $2,016.00 to $521.00, petitioner Bandrowski from $1,907.00 to $670.00, petitioner Clarke from $2,567.00 to $1,103.00, and petitioner Franz from $1,426.00 to $478.00. (J.A. 6-7).

from the company who were entitled to early retirement benefits under the plan increased significantly, as did the plan's funding costs.

The actuarial assumptions Hewitt had developed previously for the plan did not reflect the increased costs, and Hewitt did not change its assumptions to reflect the increase. Rather, Hewitt delegated the responsibility for selecting actuarial assumptions to Kaiser.

According to the plaintiffs, Hewitt's conduct was improper. Had Hewitt employed proper actuarial assumptions, Kaiser would have had to make substantially higher contributions to the plan. Hewitt failed to disclose this funding inadequacy in any certificate or other writing which it prepared on behalf of the plan. As a consequence of Hewitt's acts and omissions, Kaiser failed to fund the plan adequately, and the plan's assets became insufficient to satisfy benefit commitments, including the commitment to pay the plaintiffs their fully vested pensions. (J.A. 36-37).

Plaintiffs further alleged: that Hewitt did actuarial work for Kaiser Steel at the same time it performed services for the plan; that Hewitt did not want to jeopardize its lucrative professional relationship with Kaiser; and that Hewitt failed to disclose to plan administrators its relationship with Kaiser or the potential conflict that the relationship created. (J.A. 36-37).

Plaintiffs asserted three separate legal theories under ERISA against Hewitt:

(a) Hewitt breached its fiduciary duties to the Plan;

(b) Hewitt knowingly participated in a breach of fiduciary duty; and,

(c) Hewitt breached its actuarial duties to the Plan. (J.A. 38).

Plaintiffs also alleged that Hewitt committed professional malpractice under California law and invoked the Court's pendent jurisdiction. (J.A. 38).[2]

On March 7, 1990, Hewitt moved to dismiss the Complaint under F.R.Civ.P. 12(b)(6) on the grounds that the Complaint failed to state an ERISA claim for which relief could be granted and that the applicable California statute of limitations barred plaintiffs' pendent state law claim for professional malpractice.

On August 9, 1990, the district court dismissed all of petitioners' claims and entered judgment for respondent. (J.A. 31-32). The district court held that Hewitt could not be held responsible for losses suffered by plaintiffs because: (1) the facts alleged in the complaint did not warrant a finding that Hewitt acted as a fiduciary under ERISA; (2) ERISA provides no remedy against a non-fiduciary who participates in a breach of fiduciary duty; (3) ERISA provides no remedy for Hewitt's alleged breach of professional actuarial duties; and (4) the California statute of limitation barred plaintiffs' state law malpractice claim.

---

[2] The plaintiffs did not appeal to the Ninth Circuit their claim, dismissed by the district court, that Hewitt had engaged in a party-in-interest transaction prohibited by ERISA. (J.A. 29-30).

Petitioners filed a timely Notice of Appeal on August 25, 1990. On November 4, 1991, the Ninth Circuit affirmed the dismissal of all of petitioners' ERISA-based claims, but reversed the district court's dismissal of petitioners' pendent state professional malpractice claim. (J.A. 49).[3]

Petitioners sought certiorari only with respect to the court of appeals holding, based on *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), that non-fiduciaries are not liable under ERISA for knowingly participating in fiduciary breaches.

The court of appeals concluded that Congress' enactment of the Omnibus Budget Reconciliation Act ("OBRA") of 1989, adding a new ERISA enforcement provision, 29 U.S.C. § 1132(*l*), did not confirm Congress's original intent to permit suits against non-fiduciaries who knowingly aid and abet a fiduciary in the commission of a breach of fiduciary duty. (J.A. 41-44).

Noting that section 1132(*l*) applies "to the Secretary only, not to plan participants" (J.A. 43), the Ninth Circuit declined to read the recent Congressional enactment as indicating that sections 502(a)(3) and (5), 29 U.S.C. §§ 1132(a)(3) and (5), had always imposed liability on a non-fiduciary who knowingly aids and abets an ERISA fiduciary in breaching his ERISA duties. (J.A. 43-44). Rather, the court held that the amendment *created*, for the first time, a cause of action by the *Secretary* against non-fiduciaries under §§ 502(a)(3) and (5), but not on behalf of plan participants and beneficiaries. (J.A. 43-44).

[3] Upon remand Hewitt moved to dismiss plaintiffs' California professional malpractice claim on the grounds of preemption. On June 5, 1992, prior to this Court's grant of certiorari, the district court denied Hewitt's motion.

SUMMARY OF THE ARGUMENT

I

Congress' 1989 amendment of ERISA, which requires the Secretary of Labor to assess civil penalties against nonfiduciaries who knowingly participate in a breach of fiduciary duty, confirms Congress' original intent to impose liability on aiders and abettors of fiduciary breaches.

In enacting the Omnibus Budget Reconciliation Act of 1989 ("OBRA"), Congress added a new subsection ("*l*") to ERISA section 502(*l*), 29 U.S.C. 1132(*l*). The amendment requires the Secretary to assess a civil penalty against "knowing participants" in fiduciary breaches "in an amount equal to 20 percent of the *applicable recovery amount*." (emphasis added). The term "applicable recovery amount" is defined in section 1132(*l*)(2) as any amount which is recovered in a proceeding by the Secretary under sections 1132(a)(2) or (5). However, there could be no such "recoveries" from nonfiduciaries unless sections 1132(a)(2) and (a)(5) already encompassed such relief.

Section 1132*(a)(5)* provides for suit by the Secretary to obtain "appropriate equitable relief" to redress violations of the statute or to enforce its provisions. Section 1132*(a)(3)* provides, in the identical language, for such

suits by pension plan participants. If the Secretary has the right to bring an action for monetary relief against nonfiduciaries under section 1132(a)(5), then participants must have the corresponding right to sue nonfiduciaries under section 1132(a)(3). Identical statutory provisions must be given the same effect.

New section 1132(*l*) did not, as the court of appeals believed, *create* a new cause of action against nonfiduciaries in the Secretary alone. Nothing in ERISA's remedial scheme, which gives the Secretary and participants virtually the same enforcement rights, supports such a conclusion. Rather, the amendment simply established a civil penalty scheme, which comes into play only if the Secretary has recovered money from a nonfiduciary under section 1132. Contrary to the Ninth Circuit's holding, section 1132(*l*) confirmed the existence of the underlying cause of action against nonfiduciary aiders and abettors. Adding a mandatory penalty provides further deterrence against both ERISA fiduciaries who breach their duties and nonfiduciaries who knowingly participate in such breaches.

II

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 462 U.S. 85, 90 (1983). Section 1132(a)'s provision for "appropriate" equitable relief to "redress" violations of the statute is a clear mandate to the courts to fashion all remedies which are appropriate to enforce the Act. It should be construed to include make-whole relief against

nonfiduciaries who knowingly participate in fiduciary breaches.

The Ninth Circuit read this Court's decision in *Massachusetts Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), too broadly when, in *Nieto v. Ecker*, 845 F.2d 868 (1984), it concluded that the only remedies available to redress breaches of fiduciary duty are those expressly enumerated in the statute. In *Russell*, the Court addressed the question of whether, under ERISA Section 409, 29 U.S.C. 1109, a cause of action for breach of fiduciary duty inures to individuals, or only to a plan. Construing only Section 1109, the Court emphasized the Congressional concern with protecting the assets of the *plan* from fiduciary misconduct. Against this background, the Court was reluctant to infer remedies under section 1109 on behalf of individuals for fiduciary breaches. *Russell* did not consider the scope of the remedies available to individuals or plans under section 1132 to redress violations of the statute.

Since *Russell*, the Court has stated in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 478 (1990), that the remedial provisions of section 1132 are broad enough to encompass remedies which are not specifically enumerated. Furthermore, in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Court held that ERISA's legislative history confirms that ERISA's "fiduciary responsibility provisions" codified principles of trust law. *Firestone* explicitly directs the federal courts to develop a federal common law of "rights and obligations" under ERISA-regulated plans, drawing upon principles of trust law.

Under the law of trusts, a knowing participant in a fiduciary breach is jointly and severally liable for the full amount of the loss sustained. Four other courts of appeals and the great majority of district courts which have considered the issue of nonfiduciary liability under ERISA have held that ERISA incorporates this principle of trust law.

This interpretation of the statute is the most sensible one. ERISA's fiduciary responsibility provisions are at the center of ERISA's remedial scheme. As pointed out by *Russell*, their purpose is to protect plan assets against fiduciary misconduct, and to ensure the rights of those who are promised such benefits. Under traditional trust law, those who knowingly assist a fiduciary in breaching his fiduciary duties are as responsible for the breach as the fiduciary. This Court should not hold that Congress, while enacting powerful proscriptions on fiduciary misconduct, has at the same time chosen to exempt from responsibility those who aid fiduciaries in carrying out violations of ERISA.

III

The Ninth Circuit's interpretation of ERISA provides beneficiaries with less protection than they had before ERISA was enacted. Prior to ERISA, under the law of trusts, courts imposed liability on third persons who knowingly participated in a breach of fiduciary duty.

Incorporation of nonfiduciary liability in the circumstances of this case is consistent with the entire history and purpose of ERISA. It was the need to better protect

pension plan participants that spurred the passage of ERISA and inspired the Congressional mandate for the courts to develop a federal common law in the enforcement of ERISA. Congress envisioned that the courts would develop a body of federal substantive law to enforce the statute and adapt trust law to the particular purposes of employee benefit plans.

Under ERISA, a cause of action against nonfiduciaries who knowingly participate in breaches of fiduciary duty is essential to deter violations of ERISA's fiduciary responsibility provisions, and to ensure that plans can recover losses caused by such violations. Often, fiduciaries cannot carry out violations of ERISA without the cooperation of others. Pension plan participants would be denied full relief if they were unable to recover against nonfiduciary aiders and abettors. Congress did not intend to eliminate this important protection, which was deemed essential to the protection of beneficiaries even before the passage of ERISA.

ARGUMENT

I. CONGRESS'S 1989 AMENDMENT OF ERISA, WHICH REQUIRED THE SECRETARY OF LABOR TO PURSUE CIVIL PENALTIES AGAINST NONFIDUCIARIES WHO KNOWINGLY PARTICIPATE IN FIDUCIARY BREACHES, CONFIRMED ITS ORIGINAL INTENT TO IMPOSE ERISA LIABILITY ON AIDERS AND ABETTERS OF FIDUCIARY BREACHES.

In enacting the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 201, 103 stat. 123

("OBRA"), Congress added a new subsection ("*l*") to ERISA Section 502, 29 U.S.C. § 1132 (Supp. II 1990). This amendment requires the Secretary of Labor ("the Secretary") to pursue civil penalties against knowing participants in fiduciary breaches, as follows:

> In the case of –
>
> > (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this sub-title by a fiduciary, or
> >
> > (B) **any knowing participation in such a breach or violation by any other person,**
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of **the applicable recovery amount.** (Emphasis added.)

This mandatory civil penalty strengthens the statute by imposing substantial monetary sanctions upon a fiduciary who breaches his duties, and "any other person" who knowingly participates in such breaches. H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. & Admin. News 3018, 3035-36.

The penalty referred to in Section 1132(*l*) is "an amount equal to 20 percent of the applicable recovery amount." The term "applicable recovery amount" is defined in section 1132(*l*)(2) as:

> any amount which is recovered from a fiduciary or other person with respect to a breach or violation . . . (A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

There could be no such "recoveries" from non-fiduciaries, however, unless sections 1132(a)(2) and (5) already encompassed monetary relief from non-fiduciaries. The OBRA amendment thus makes it apparent that the Secretary *always* had the power to institute litigation against non-fiduciaries under subsections (a)(2) and (a)(5).

Section 1132(a)(2) provides that suit may be brought by the Secretary *or* by plan participants for relief under 29 U.S.C. § 1109. Thus, if the Secretary could sue non-fiduciary aiders and abetters under section 1132(a)(2), then plan participants must also have had that right.

Similarly, if the Secretary can bring an action against a non-fiduciary under section 1132(a)(5), then a plan participant must have the corresponding right to sue non-fiduciaries under section 1132(a)(3). The relevant language in sections 1132(a)(3) and (a)(5) is identical; identical statutory language must be given the same effect. See *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2596 (1992) ("[a] basic canon of statutory construction [is] that identical terms within an Act bear the same meaning."); *Pension Fund-Mid Jersey Trucking Industry-Local 701 v. Omni Funding Group*, 731 F. Supp. 161, 178 n. 11 (D.N.J. 1990) (treating sections 1132(a)(3) and (a)(5) as the same for purposes of implying a cause of action for knowing participation in a breach of fiduciary duty).

In rejecting this analysis, the Ninth Circuit misconstrued the plain language of section 1132(*l*), which does not, as the court incorrectly concluded, *create* a new

cause of action by the Secretary against aiders and abetters. Rather the amendment simply establishes a civil penalty provision, which comes into play only if the Secretary has recovered money from a non-fiduciary either through settlement or through a section 1132(a)(5) judicial proceeding. Contrary to the Ninth Circuit's holding, new section 1132(*l*) confirmed the existence of the underlying cause of action against non-fiduciary aiders and abetters in section 1132(a). *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1968) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction").

Indeed, nothing in ERISA's remedial scheme – which vests virtually co-extensive enforcement rights in both the Secretary and participants – supports the Ninth Circuit's conclusion that Congress intended to afford the Secretary, but not private plan participants and beneficiaries, the exclusive right to recover against non-fiduciaries. As noted, the enforcement language in section 1132(a)(2) applies both to the Secretary and participants; the language in section 1132(a)(3) (relating to participants and beneficiaries) is identical to that in 1132(a)(5) (relating to the Secretary). Nevertheless, the Ninth Circuit declined to read the OBRA amendment to ERISA as indicating that section 1132 always imposed liability on a non-fiduciary who knowingly aids and abets an ERISA fiduciary in breaching his duties. The court concluded that "[i]n drafting the ERISA amendments in 1989, Congress considered but rejected an amendment to overrule our decision in *Nieto*. (Citations omitted.) We decline to do what Congress has refused to do." (J.A. 44).

The court observed that an early version of OBRA, H.R. 3299, would have added a new section 409(c), 29 U.S.C. § 1109(c), explicitly stating that persons who knowingly participate in a breach of fiduciary duty "shall be personally liable to the plan for such breach of fiduciary responsibility in the same manner and to the same extent as if they were a fiduciary committing such breach." H.R. 3299, 101st Cong., 1st Sess., § 3161(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). The report on H.R. 3299 states that the purpose of proposed section 409(c) was to resolve "the conflict in the courts of appeal by clarifying Congressional intent to codify in ERISA the common law of trusts as it applies to employee benefit plans." H.R. Rep. No. 247, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 1969-70.

Contrary to the Ninth Circuit's conclusion, Congress's omission in the final amendment of language explicitly overruling *Nieto* does not indicate approval of *Nieto*. Such "[c]ongressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.' " *PBGC v. LTV Corp.*, 496 U.S. 633, 110 S.Ct. 2668, 2678 (1990) (quoting *U.S. v. Wise*, 370 U.S. 405, 411 (1962)). Indeed, at the time Congress enacted OBRA, all of the other circuits which had addressed the issue of non-fiduciary liability had concluded that such liability existed under ERISA. The OBRA amendment that Congress did in fact adopt indicates that Congress approved of these appellate decisions, rather than *Nieto*, as reflecting the correct interpretation of the statutory text as written.

Moreover, in providing for a "waiver" of the civil penalty in section 1132(*l*)(3)(B) Congress could not have made more clear that the phrase "appropriate equitable relief" in §§ 1132(a)(3) and (5) includes the remedy of restoration of "all losses to the plan." Under section 1132(*l*)(3)(B), the Secretary may waive or reduce the civil penalty if imposition of the penalty would interfere with the non-fiduciary's ability "to restore all losses to the plan without severe financial hardship." This waiver criterion would be meaningless if the non-fiduciary were not, in the first instance, liable for "all losses to the plan."

II. THE DECISION BELOW, IN CONFLICT WITH THOSE OF FOUR OTHER CIRCUIT COURTS OF APPEAL, UNDERMINES ERISA'S FIDUCIARY CONDUCT PROVISIONS AND THE UNIFORM NATIONAL APPLICATION OF ERISA'S REMEDIAL PROVISIONS.

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). As this court noted, by enacting ERISA, Congress intended to "preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Id.* at 99, citing 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Harrison Williams). The Ninth Circuit's decision to follow *Nieto* conflicts with the decisions of four other courts of appeals and with the decisions of the vast majority of district courts which have addressed the issue of non-fiduciary liability under ERISA.

Non-fiduciary liability under ERISA stems from the broad enforcement authority conferred upon participants,

beneficiaries, and fiduciaries by section 1132(a)(3) and upon the Secretary by section 1132(a)(5) to obtain "appropriate equitable relief" to "redress" violations of the statute or "to enforce" any of its provisions. Congress's broad language requiring federal courts to provide "appropriate" equitable relief is a clear mandate to fashion all remedies which are appropriate to enforce the Act. "The legislative history demonstrates that Congress intended federal courts to develop federal common law in fashioning the additional 'appropriate equitable relief,' " provided for in sections 1132(a)(3) and (5). *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985) (Brennan, J. concurring). It should be construed to include make-whole relief against non-fiduciaries who knowingly participate in bringing about violations of ERISA.

Nieto was decided without the benefit of *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), in which the Court explicitly authorized the development of a federal common law of rights and responsibilities drawing upon principles of trust law. Speaking for the Court, Justice O'Connor emphasized that ERISA's fiduciary responsibility provisions "codified" principles of trust law and that courts were to develop a federal common law of "rights and obligations" drawing upon such principles:

> ERISA abounds with the language and terminology of trust law. . . . ERISA's legislative history confirms that the Act's **fiduciary responsibility provisions**, 29 U.S.C. §§ 1101-1114, "codif[y] and mak[e] applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 93-533, p.11 (1973), U.S. Code Cong. &

> Admin. News 1974, pp.4639, 4649. Given this language and history, we have held that courts are to develop "a federal common law of rights and obligations under ERISA regulated plans." *Id.* at 110. (Emphasis added.)

Under the law of trusts, it is a well-established principle that a knowing participant in a fiduciary breach is jointly and severally liable for the full amount of the loss resulting from that breach. See G. Bogert & G. Bogert, The Law of Trusts and Trustees, §§ 868, 901 (rev. 2d ed. 1982); 4 A. Scott, The Law of Trusts, §§ 290-295, 321-326 (3d ed. 1965 & Supp. 1985); Restatement (Second) of Trust, §§ 290-297, 321-326 (1959).

The courts of appeals which have recognized the liability of non-fiduciaries have held that ERISA incorporates this principle from trust law. *Whitfield v. Lindemann*, 853 F.2d 1298, 1303, (5th Cir. 1988), *cert denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989) ([A]lthough Klepak was not a statutory fiduciary, he was, as the district court held, jointly liable . . . as a non-fiduciary who knowingly participated in a breach of trust"); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (non-fiduciary liable for assisting fiduciary co-defendant in scheme to cause plans to use assets in ways which benefited defendants); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (principals in, and affiliates of, corporation which breached fiduciary duties held liable as knowing participants in breach); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (*dictum*); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982) (holding, on a motion to dismiss, that a non-fiduciary, alleged to have conspired with a fiduciary to mislead other fiduciaries

into taking action which harmed plan, can be held liable under ERISA); (citations omitted).[4]

In arriving at a result contrary to that reached by the vast majority of courts addressing the issue of ERISA non-fiduciary liability, the Ninth Circuit in *Nieto* concluded from the liability provisions of section 1109(a) (which provides that "[a]ny person who is a fiduciary" shall be "personally liable" to a plan for any breach of fiduciary duty) that had Congress intended to include non-fiduciaries, it would have done so explicitly. *Nieto*, 854 F.2d at 871-874. The court found, moreover, that interpreting section 1132 to provide causes of action against non-fiduciaries would in effect render section 1109 superfluous, "a result contrary to the fundamental canons of statutory construction." *Id.* at 873.

The Ninth Circuit read *Russell* too broadly when it concluded that the only remedies available to redress fiduciary breaches are those specifically enumerated in the statute. In *Russell* the Court addressed the question of whether, under ERISA section 409, 29 U.S.C. § 1109, a cause of action for breach of fiduciary duty inures to individuals, or only to a plan. Construing section 1109,

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[4] Although decided after the 1989 OBRA amendment, *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), the only appellate decision adopting *Nieto*, does not discuss the effect of that amendment on the issue presented. (Trying to reconcile *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), with *Nieto*, the court of appeals held in *Useden* that "a court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute".) *Id.* at 1581.

the Court emphasized Congress' concern with protecting the assets of the plan from fiduciary misconduct. Against this background, the Court was reluctant to infer remedies under section 1109 on behalf of individuals for fiduciary breaches. *Russell* did not consider the scope of the remedies available to individuals or plans under section 1132 to redress violations of the statute.

Since *Nieto*, the Supreme Court has analyzed section 1132(a) generally and section 1132(a)(3) in particular. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478 (1990), the Court concluded that the remedial provisions of section 1132 are broad enough to encompass remedies which are *not* specifically enumerated. Although the Court in *Ingersoll* did not discuss in detail what remedies are available as "other appropriate equitable relief" under section 1132(a)(3), the Court stated, "[i]t is clear that the relief requested" – which included a prayer by the plaintiff in that case for compensatory damages – "is well within the power of federal courts to provide." 111 S.Ct. at 486. (dictum) Notably, an award of compensatory damages is not a specifically enumerated remedy under section 1132. In light of *Ingersoll-Rand*, it is apparent that the Ninth Circuit in *Nieto*, and now in this case, incorrectly applied *Russell* to support its holding that the *only* remedies available to redress fiduciary breaches are those specifically enumerated in the statute.

The requirements relating to fiduciary responsibility are the core provisions of the ERISA remedial scheme. Their overriding purpose was to protect pension plan assets against misconduct and to ensure the rights of those who are promised such benefits. As discussed in Part III, *infra*, basic trust law holds those who knowingly

participate with fiduciaries in committing fiduciary breaches as responsible as the fiduciary. Given the entire background and legislative history of ERISA, Congress could not have meant to exempt from liability those who knowingly assist in the commission of fiduciary breaches. No persuasive explanation has been given by the Ninth Circuit or by any other court as to why Congress would enact powerful proscriptions on the conduct of fiduciaries, while, at the same time, completely exempting those who knowingly aid fiduciaries in violating the statute's fiduciary provisions.

A cause of action against non-fiduciaries is essential in order to deter violations of ERISA's fiduciary responsibility provisions and to ensure that plans have the means to attain complete recovery of all losses caused by such violations. See Part III, *infra*. Cf. *Brock v. Gerace*, 635 F. Supp. at 569 (plan's participants would be denied full relief if the Secretary were unable to recover from non-fiduciaries).

The Ninth Circuit also erred in *Nieto* when it focussed almost entirely on section 409 of the Act, 29 U.S.C. § 1109, and section 502(a)(2), 29 U.S.C. § 1132(a)(2) (which, as noted, *supra*, authorizes actions to enforce section 1109) and concluded that the plain language of the statute limited ERISA's coverage to fiduciaries only. *Nieto*, 845 F.2d at 871-874. The court concluded that interpreting section 1132 to provide causes of action against non-fiduciaries would in effect render section 1109 superfluous. *Id.* However, as noted by Judge Wiggins in his opinion concurring in the judgment on other grounds

"[b]y reading section 409(a), 29 U.S.C. § 1109(a), in isolation, [the court] ignores the clear requirement of the Act to provide the broadest possible remedies under ERISA to plan beneficiaries." *Id.* at 875.

That Congress specified a fiduciary's liability in section 1109 does not preclude construing the broad language of sections 1132(a)(3) and (5) to reach a wider class of persons who aid in the commission of a fiduciary breach. As Judge Wiggins also noted, section 1109(a) "is simply one section among many that impose liability on those who violate the substantive provisions" of ERISA. *Id.*[5]

The decision in *Nieto* is also internally inconsistent. Although the court refused to recognize a claim under the Act against a non-fiduciary knowing participant, it did rule that a non-fiduciary can be liable in an action

[5] Hewitt argues that make-whole relief is a "damages" remedy not included in the term "equitable relief" in section 1132(a)(3). In *United States v. Mitchell*, 463 U.S. 206 (1983), however, this Court held that damages were an available remedy for breach of trust: "It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of Trusts, secs. 205-212 (1959); G. Bogert & G. Bogert, Law of Trusts and Trustees, sec. 862 (2d ed. 1965); 3 A. Scott, Law of Trusts, sec. 205 (3d ed. 1965)." *Id.* at 226. The Court implied a damages remedy for breach of trust because "prospective equitable remedies are totally inadequate [to protect beneficiaries]." *Id.* at 227. See also, e.g., G. Bogert & G. Bogert, Law of Trusts and Trustees, sec. 862 (2d ed. 1982) at 27: "For breach of trust the trustee may be **directed by the chancellor** to make a payment of damages to the beneficiary. . . . Acts of "negligence or misconduct in the making or retaining of investments may give rise to a right in favor of the beneficiaries to recover money damages from the trustee." *Id.* at 30-31. (Emphasis added.)

brought pursuant to section 1132(a)(3) when the non-fiduciary acts as a "party in interest" (29 U.S.C. § 1002(14)(b)) and engages in a prohibited transaction (29 U.S.C. § 1106(a)).[6] The court acknowledged that the broad equitable relief provided in section 1132(a)(3) (and therefore section 1132(a)(5)) "is not limited to fiduciaries." *Id.* at 874. The court held that equitable relief can be obtained against parties in interest that benefit from engaging in prohibited transactions, despite the fact that ERISA does *not* expressly bar parties in interest from engaging in prohibited transactions or explicitly provide relief from them for such actions. The court reasoned that "[c]ourts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them." *Id.*

Finally, the language of sections 1132(a)(3) and (5) provides no basis to read those provisions so as to permit lawsuits against non-fiduciaries who engage in prohibited transactions, but not against those who knowingly participate in fiduciary breaches. The Ninth Circuit's interpretation provides inadequate protection for employee benefit plans because not all non-fiduciary participants in fiduciary breaches are parties in interest and not all fiduciary breaches are prohibited transactions.

[6] ERISA Section 406, 29 U.S.C. § 1106, which prohibits a "fiduciary" from causing an ERISA plan to engage in a prohibited transaction with a "party in interest" does not, by its express terms, provide a remedy against the non-fiduciary party in interest. Nor does section 1132. Nevertheless, the Ninth Circuit inferred the liability of the party in interest under section 1132(a)(3).

III. THE NINTH CIRCUIT'S NARROW CONSTRUCTION OF ERISA AND REFUSAL TO INCORPORATE NON-FIDUCIARY LIABILITY FOR KNOWINGLY PARTICIPATING IN A BREACH OF FIDUCIARY DUTY THREATENS EFFECTIVE PROTECTION OF EMPLOYEE BENEFIT PLANS.

The Ninth Circuit's interpretation of ERISA provides beneficiaries and participants with substantially less protection than they had before ERISA was enacted. Prior to ERISA, under the law of trusts, courts imposed liability on third persons who knowingly assisted or participated in a breach of fiduciary duty. ERISA was a reform statute. It would be paradoxical if it were interpreted to provide less protection to pension plan participants and beneficiaries than they had before ERISA.

Liability of non-fiduciaries who knowingly participate in breaches of fiduciary duty is essential to the complete protection of participants and beneficiaries. Trustees often cannot carry out violations of ERISA without the active cooperation of third parties. Third party liability is also important to provide complete relief. The trustees may be judgment proof or otherwise unable to provide complete relief restoring fully all losses suffered by a plan. Congress clearly did not intend to eliminate this protection, which was deemed essential even before the passage of ERISA.

A. Under the Law of Trusts, Third Persons Who Knowingly Assist in Breaches of Fiduciary Duty Are Liable to the Trust Beneficiaries.

The common law of trusts imposes liability on third persons who knowingly participate in a breach of trust. A

trust beneficiary has a reasonable expectation that third persons have a duty not to knowingly participate in a breach of trust. *See* G. Bogert & G. Bogert, *The Law of Trusts & Trustees*, section 326 (1959) (third person who knowingly participates in breach of trust is liable to beneficiary for any loss thereby caused). *See also* Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 481 (1921) (trust law places liability on third person for knowingly participating with fiduciary in breach of trust).

At common law, "[c]ourts will always impose liability for knowing participation in any fiduciary breach of duty." Comment, *Nieto v. Ecker, Incorporation of Nonfiduciary Liability Under ERISA*, 73 Minn. L. Rev. 1303, 1311 (1989). Prior to ERISA, both state and federal courts imposed such liability in order to fully protect trust beneficiaries. *See, e.g., Jackson v. Smith*, 254 U.S. 586, 589 (1920) (holding non-fiduciaries who joined fiduciary in sale of trust property to trustee jointly and severally liable for profits obtained); *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493, 498 (9th Cir. 1955) (stating that third person who colludes with fiduciary in committing breach of duty is under duty of restitution to beneficiary); *Whitford v. Reddeman*, 196 Wis. 10, 22, 23, 219 N.W. 361, 365-66 (1928) (recognizing court's power to enforce trust, complete trustee accounting, and hold liable those who assist trustee in violation of trust); *Massie v. Barth*, 634 S.W.2d 208, 211 (Mo. Ct. App. 1982) (holding that third party who has notice that trustee is committing breach of trust and participates with trustee is liable to beneficiary for any loss caused by breach of trust).

The imposition of non-fiduciary liability was thought important for the full protection of the beneficiary. Non-

fiduciary third persons often participate in the trustee's breach of fiduciary duty.[7] Perhaps even more critical, fiduciaries depend on active cooperation from non-fiduciary third parties to enable them to carry out breaches of fiduciary duty. *See, e.g.*, Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 19 (1934) (arguing violations of fiduciary duty do not usually occur without active assistance of others). It was against this background of common law liability that ERISA was enacted in order to provide more complete protection to the participants and beneficiaries of employee benefit plans.

[7] *See Jackson v. Smith*, 254 U.S. 586, 589 (1921) (third party participated in trustee's sale of trust property); *Carter Oil Co. v. Crude Oil Co.*, 201 F.2d 547, 551 (10th Cir. 1953) (non-fiduciary who knew co-tenant intended to misappropriate payments that should be shared by another co-tenant may be liable for participating in breach of trust); *Marshall v. Lovell*, 19 F.2d 751, 753 (8th Cir. 1927), *cert denied*, 276 U.S. 616 (1928) (trustee bribed by non-fiduciary); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1096 (D.D.C. 1971) (union participated in conspiracy with employee welfare fund trustees and bank president and knowingly allowed plan funds to be held in interest-free accounts); *Malmud v. Blackman*, 278 N.Y. 658, 16 N.E.2d 391 (1938) (*per curium*) (non-fiduciary borrower who accepted usurious loan from trustee held liable for all loss caused to estate); *Zagrans v. Cohn*, 404 Pa. 315, 319, 172 A.2d 291, 293 (1961) (non-fiduciary sellers who induced trustee to make illegal investment held jointly and severally liable for losses of trust property, when they knew or ought to have known of breach of trust although purchase was in name of trustee without trust label); *Whitford v. Reddeman*, 196 Wis. 10, 24, 25, 219 N.W. 361, 366 (1928) (third party aided trustee in deceiving beneficiaries of investment trust regarding financial stability of trust).

B. Third Party Liability Under ERISA for Participation in Breaches of Fiduciary Duty is Necessary for the Effective Protection of Participants and Beneficiaries

In interpreting and applying ERISA, most federal courts have recognized that rejection of non-fiduciary liability is inconsistent with the remedial purposes of the Act. In conformity with pre-ERISA trust law, the vast majority of federal courts have held that ERISA includes a non-fiduciary liability standard for knowing participation in a fiduciary's breach of trust.[8]

This incorporation of non-fiduciary liability is consistent with the entire history and purpose of ERISA. It was the need to better protect plan participants that spurred the passage of ERISA and inspired the Congressional mandate for the courts to develop a "federal common

[8] *See Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); *Dole v. Compton*, 753 F. Supp. 563, 565-569 (E.D. Pa. 1990); *Pension Ben. Guar. Corp. v. Ross*, 733 F. Supp. 1005, 1008 (M.D. N.C. 1990); *Pension Fund-Mid Jersey Trucking Industry-Local 701 v. Omni Funding Group*, 731 F. Supp. 161, 176-179 (D.N.J. 1990); *Brock v. Gerace*, 635 F. Supp. 563, 566 (D.N.J. 1986); *Foltz v. U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1167-1168 (D.D.C. 1986); *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1395-1396 (D. Nev. 1984); *Donovan v. Bryans*, 566 F. Supp. 1258, 1266-1267 (E.D. Pa. 1983); *Donovan v. Daugherty*, 550 F. Supp. 390, 410-411 (S.D. Ala. 1982); *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 641-642 (W.D. Wis. 1979). *See also Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989) (court assumes but does not expressly determine the existence of such liability).

law" in the enforcement of ERISA. Congress envisioned that a "body of [f]ederal substantive law [would] be developed by the courts to deal with issues involving rights and obligations under private welfare pension plans," 120 Cong. Rec. 29,942 (1974) (statement of Senator Javits), and that the federal courts would adapt trust law to the particular purposes of employee benefit plans. *See* S. Rep. No. 127, 93d Cong., 2d Sess. 29, reprinted in 1974 U.S. Code Cong. & Admin. News 4838, 4865. While the statute was detailed, the courts were needed to give it flesh and blood in actual operation. "But Congress realized that the bare terms, however detailed, of these statutory provisions would not be sufficient to establish a comprehensive regulatory scheme. It accordingly empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans." *Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984). *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989) ("We have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated pension plans' ").

The ability to hold third parties responsible for active participation in breaches of duty by fiduciaries is critical to the remedial purposes of ERISA. As mentioned above, non-fiduciaries participate in many fiduciary breaches. Furthermore, in many cases, fiduciaries simply will not be able to carry out such breaches without the active cooperation of third persons. The present case provides a vivid illustration of this fact. Petitioners allege that Hewitt, contrary to its professional responsibilities as the

Plan's actuary, knowingly aided and abetted the fiduciaries in allowing the severe underfunding of the Kaiser Steel Retirement Plan. Hewitt acted so as not to jeopardize its lucrative professional relationship with Kaiser on other matters. As a consequence of Hewitt's acts and omissions, the PBGC was forced to terminate the Plan pursuant to ERISA's distress termination procedures. The petitioners and all of the other participants and beneficiaries of the Plan suffered substantial losses in their retirement income.

Courts have recognized, both before and after the enactment of ERISA, that non-fiduciary liability is necessary to provide complete relief to participants and beneficiaries of employee benefits. *See Brock v. Gerace, supra,* at 569: "In the present case, the Local 564 dental plan's participants and beneficiaries *would be denied full relief* if the secretary were unable to recover from [knowingly participating] non-fiduciaries. . . . " (emphasis added); *see also Freund v. Marshall & Ilsley Bank,* 485 F. Supp. 629, 641-642 (W.D. Wis. 1979) (plan fiduciaries permitted the plan to loan all of its assets back to the sponsoring companies in exchange for unsecured promissory notes); *Lowen v. Tower Asset Management Corp, Inc., supra,* 829 F.2d at 1220-1221 (recognizing necessity of non-fiduciary liability under ERISA to pierce corporate form and prevent channeling of profits from fiduciary breaches to non-fiduciary entities to insulate them from liability under ERISA).

Given that non-fiduciary liability is necessary to fulfill the purpose of ERISA to protect plan participants and beneficiaries, surely the broad remedial provisions of ERISA encompass this basic remedy. The remedy is not

incidental; it goes to the core of ERISA's protection. Congress did not intend to exclude it from the remedies a federal court may give in enforcing ERISA. "[N]o sound reason appears why ERISA should be emasculated by a construction which precludes civil actions against nonfiduciaries." *Brock v. Gerace, supra,* 635 F. Supp. at 569.

CONCLUSION

For the reasons set forth above, petitioners urge that this Court grant the writ.

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In The

Supreme Court of the United States

October Term, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether § 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a) (1988 & Supp. II 1990), authorizes employee benefit plan participants to maintain a civil action for money damages – as opposed to equitable relief – against a non-fiduciary who provides actuarial services to an employee benefit plan, when it is alleged that the provider participated knowingly in a fiduciary breach under ERISA.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of ERISA, ERISA Regulations and the Internal Revenue Code are reproduced in the Appendix to this Brief (1A-10A).

STATEMENT OF THE CASE

Respondent, Hewitt Associates ("Hewitt"), respectfully submits that the Ninth Circuit's decision, holding that ERISA employee benefit plan participants cannot maintain a civil action for money damages against a non-fiduciary provider of actuarial services who allegedly participated knowingly in a fiduciary breach under ERISA, should be affirmed. (Joint Appendix ("J.A.") 35-49.)

BACKGROUND

This action is the third in a series of cases filed by former salaried employees of Kaiser Steel Corporation ("Kaiser") seeking to recover benefits lost when the Pension Benefit Guaranty Corporation ("PBGC") terminated the Kaiser Steel Retirement Plan ("Plan") in February 1987, immediately following Kaiser's bankruptcy.

In the first case, former Kaiser employees unsuccessfully sued certain Plan fiduciaries alleging that their failure to purchase pension funding annuities constituted an abuse of discretion and a breach of their fiduciary duties under ERISA. *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412 (9th Cir. 1991).

A second class action currently pending in the District Court (filed in 1988 by the same former Kaiser employees who are the Petitioners here) claims that the Plan fiduciaries breached their fiduciary duties by failing to ensure the Plan's adequate funding. *Mertens v. Black*, No. CV 88-3587-MHP (N.D. Cal. 1989).

On December 18, 1989, Petitioners filed this class action against Hewitt, an employee benefit consulting firm that performed actuarial services for Kaiser during the 1980's. (J.A.

1.) Petitioners allege that the Plan's financial woes were not caused by Kaiser's demise or the actions of the Plan's fiduciaries, but rather by Hewitt's failure to comply with its "professional obligations" under ERISA. (J.A. 7.)

PETITIONERS' COMPLAINT

According to the Complaint,[1] during the early 1980's, Kaiser began to restructure its business. That restructuring ultimately resulted in the virtual elimination of its steelmaking operations. (J.A. 4-5.) The number of Kaiser employees entitled to full early retirement benefits under the Plan allegedly increased significantly, as did the Plan's funding costs. (J.A. 5.)

Petitioners contend that the actuarial assumptions Hewitt had previously developed for the Plan did not reflect the cost increases and that Hewitt did not change its assumptions to reflect those increases. (*Id.*) As a result of Hewitt's alleged improper conduct, Kaiser purportedly failed to fund the Plan adequately and the Plan's assets thus became insufficient to satisfy its benefit commitments. (J.A. 6.)

In February, 1987, the PBGC determined that the Plan was underfunded and incapable of paying its liabilities. (J.A. 37 n.1.) Accordingly, the PBGC terminated the Plan and began paying Petitioners and other participants reduced benefits. (J.A. 6.)

Petitioners' asserted three causes of action against Hewitt: (1) a "breach of professional duties" claim under ERISA (J.A. 9-13); (2) a "prohibited transaction" claim under ERISA (J.A. 13-14); and (3) a professional negligence claim under California law. (J.A. 15-17.)

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[1] The District Court granted Hewitt's Fed. R. Civ. P. 12(b)(6) motion and the Ninth Circuit affirmed that dismissal on the claim before this Court. (J.A. 19-33; 35-49.) For purposes of that motion only, the allegations of the Complaint were accepted as true. Hewitt denies all material allegations of Petitioners' Complaint and maintains that at all times it complied with ERISA and all generally accepted actuarial principles and standards in performing its work on the Plan.

The Complaint did *not* assert that Hewitt participated in a fiduciary breach, nor, for that matter, did it allege that a fiduciary duty had been breached by anyone.

HEWITT'S MOTION TO DISMISS

On March 7, 1990, Hewitt moved to dismiss the Complaint on the grounds that it was barred by the applicable statutes of limitations and that the ERISA counts failed to state claims upon which relief could be granted. (*See* J.A. 1.) In response to Hewitt's motion, Petitioners argued, for the first time, that their initial claim (breach of professional duties) should be construed to support any of three different causes of action: (1) breach of fiduciary duty under ERISA; (2) knowing participation in a breach of fiduciary duty under ERISA; or (3) breach of professional actuarial duties under ERISA. (J.A. 22, 25-26.) Petitioners stood by their remaining claims as pled.

THE DISTRICT COURT'S DECISION

The District Court construed the Complaint in the light most favorable to Petitioners, including construing it, over Hewitt's objections, to include claims for breach of fiduciary duty and knowing participation in an ERISA fiduciary breach. The court then determined that the ERISA claims were insufficient as a matter of law and that the applicable California two year limitations period barred the pendent professional negligence claim. (J.A. 19-34.)

Specifically, the District Court held that Petitioners could not state a claim against Hewitt for breach of fiduciary duty because the Complaint merely alleged that Hewitt improperly performed its actuarial duties. Those duties did not involve exercising sufficient authority over the Plan's assets to render Hewitt an ERISA fiduciary. (J.A. 22-25.)

The District Court also held that, as a matter of law, Petitioners could not state a claim for money damages under ERISA against a non-fiduciary for knowing participation in a fiduciary breach, citing the Ninth Circuit's previous rulings in

Nieto v. Ecker, 845 F.2d 868, 873 (9th Cir. 1988), and *Call v. Sumitomo Bank*, 881 F.2d 626, 634 (9th Cir. 1989). (J.A. 25.)

Nor could Petitioners state a claim for breach of professional duties under ERISA. (J.A. 26-28.) The District Court recognized that the only avenue for redress of ERISA violations committed by a non-fiduciary is through a claim for equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988). At Petitioners' request, the District Court construed Petitioners' prayer for relief – which sought an order that Hewitt "make good to the Plan, plaintiffs and their class any and all losses to the Plan resulting from [Hewitt's alleged] breaches of ERISA," together with a claim for punitive damages (J.A. 15) – as a prayer for restitution. (J.A. 26.)

While acknowledging that restitution could be awarded under § 502(a)(3) in appropriate circumstances, the Court found such relief unavailable here because Petitioners had not alleged that Hewitt's purported violations resulted in any benefit to it beyond normal compensation.[2] (J.A. 28.)

The court further held that Hewitt's acceptance of reasonable compensation could not subject it to a "prohibited transaction" claim. (J.A. 29-30.) More fundamentally, the court found that the prohibited transaction claim failed because such a claim requires wrongful receipt of plan assets. (J.A. 30.) *See also* ERISA § 406, 29 U.S.C. § 1106 (1988). Since the Complaint alleged that Kaiser, not the Plan, paid Hewitt for its services, the District Court found that no

[2] The District Court also noted that ERISA provided redress against actuaries who violate ERISA in the form of injunctive and disciplinary relief:

> That is not to say that no protections are available against actuaries who violate ERISA without profiting from their malfeasance. Timely injunctive relief is available under §§ 502(a)(3) and (a)(5). Moreover, relief is also available through the Joint Board for Enrollment of Actuaries who may suspend or terminate an offending actuary's right to provide services to ERISA plans. (J.A. 28.)

prohibited transaction had occurred between Hewitt and the Plan. (J.A. 30.)[3]

Petitioners did not seek leave to amend their Complaint and an appeal to the Ninth Circuit followed. Petitioners *only* appealed from the dismissal of their (implied) breach of fiduciary duty and knowing participation claims and from their (explicitly pled) breach of ERISA professional duties and pendent professional negligence claims. Petitioners did not seek review of the dismissal of their prohibited transaction claim. (J.A. 38 n.2.)

THE NINTH CIRCUIT'S DECISION

The Ninth Circuit affirmed the dismissal of each of Petitioners' ERISA claims. (J.A. 35-46.) It found that Petitioners' "knowing participation" money damages claim[4] was not cognizable under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988). (J.A. 41-44.) Like the District Court, the Ninth Circuit held that ERISA § 502(a)(3) permits plan participants to seek "appropriate equitable relief" from non-fiduciaries to redress ERISA violations. (J.A. 44.) The Ninth Circuit further ruled that Petitioners could possibly obtain monetary relief under an equitable restitution theory, but agreed with the District Court that Petitioners had failed to state a viable restitution claim as a matter of law. (J.A. 44-45.)

While acknowledging the possibility that non-fiduciary service providers to ERISA plans could be liable as ERISA fiduciaries if they exercised discretionary authority over a plan, the Ninth Circuit found that Hewitt was not an ERISA fiduciary. (J.A. 39-41.) Petitioners' Complaint reflected that

[3] The District Court also held that California's two year statute of limitations barred Petitioners' pendent professional negligence claim. (J.A. 30-31.)

[4] Although Hewitt argued the issue, the Ninth Circuit never addressed the fact that Petitioners' Complaint failed to allege a fiduciary breach by anyone or that Hewitt knowingly participated in any such breach.

Hewitt had not done anything other than render actuarial services to the Plan. Since a party "rendering professional services to a plan is not a fiduciary so long as he does not exercise any authority over the plan 'in a manner other than by usual professional functions' " (J.A. 39) (citations omitted), the Ninth ~~Circuit~~ held that Petitioners could not state a breach of fiduciary duty claim against Hewitt (J.A. 41).[5]

THE PETITION FOR WRIT OF CERTIORARI

On April 14, 1992, Petitioners filed their Petition for Writ of Certiorari, seeking review only of the Ninth Circuit's holding that ERISA does not provide them with a cause of action for money damages against Hewitt despite Hewitt's purported knowing participation in a fiduciary breach. On October 5, 1992, this Court granted the Petition.

SUMMARY OF ARGUMENT

I.

The disagreement among Petitioners, the Solicitor General and Hewitt is narrow. All agree that, if plan participants can maintain an ERISA civil action for monetary relief against non-fiduciaries, such an action must be brought under the "appropriate equitable relief" provision of ERISA § 502(a)(3). (Brief for Petitioners ("Pets' Br.") at 18-19; Brief for the United States As Amicus Curiae Supporting Petitioners ("SG Br.") at 9.) Petitioners call the compensatory and punitive damages sought "monetary" or "make whole" relief to recover "losses" purportedly suffered as a result of Hewitt's improper conduct. (Pets' Br. at 10, 15, 18-19.) Whatever the label, Petitioners are seeking money damages. The

[5] The Ninth Circuit reversed and remanded the dismissal of the pendent professional negligence claim. (J.A. 48.) On remand, Hewitt moved for summary judgment on the grounds that the professional negligence claim was preempted under ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). The District Court denied – Hewitt believes erroneously – that motion.

question thus is whether "appropriate equitable relief" encompasses money damages. Under ERISA, as under the common law, the answer to that question is no.

ERISA's civil enforcement provision, § 502(a), specifies six civil actions that may be maintained by plan participants, beneficiaries, fiduciaries or the Secretary of Labor. None of § 502(a)'s provisions authorizes plan participants to seek damages from a non-fiduciary. A plan *fiduciary* is: personally liable for any losses resulting from a fiduciary breach; required to restore any profits made through use of plan assets; and subject to other "equitable and remedial relief," including removal, in a civil action initiated pursuant to ERISA § 502(a)(2). No parallel scheme of remedies exists against a non-fiduciary. Any civil action initiated by plan participants against a non-fiduciary must be brought under ERISA § 502(a)(3), which limits participants to obtaining injunctive and "other appropriate equitable relief."

ERISA's plain language demonstrates that Congress did not intend to provide plan participants with the right to obtain damages from a non-fiduciary. Given ERISA's "comprehensive and reticulated" nature and the deliberate care with which it was enacted, the "six carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." ***Massachusetts Mut. Life Ins. Co. v. Russell***, 473 U.S. 134, 146 (1985) (emphasis in original) (citation omitted). Here, the "strong" presumption that the statute's plain language expresses Congressional intent has not been rebutted.

ERISA was enacted to establish standards of conduct, responsibility and obligation for fiduciaries, and consequently, distinguishes fiduciaries from non-fiduciaries. Every employee benefit plan must provide for one or more named fiduciaries who have authority to control and manage the plan. Those named fiduciaries can delegate responsibilities among themselves or designate others to perform fiduciary functions. Apart from those named or designated as fiduciaries, a person may be deemed an ERISA fiduciary if the person exercises discretionary authority or control over a

plan. By breaking down fiduciary functions and adopting this broad discretion-centered functional definition, Congress ensured plan participants that they would always have a fiduciary to hold personally accountable for losses sustained should there be a breach of duty. However, Congress specifically chose not to subject actuaries, accountants, lawyers and other professional service providers to ERISA's fiduciary standards and attendant personal liabilities unless those service providers do more than perform their statutorily mandated functions and, in fact, exercise true discretionary control over a plan.

Petitioners seek to impose fiduciary damage liability on Hewitt even though Hewitt is not an ERISA fiduciary, since it did not exercise any discretionary control over the Plan or its assets. If their effort is successful, the careful distinction Congress drew between fiduciaries and non-fiduciaries when it enacted ERISA will be erased.

Although non-fiduciaries are not subject to ERISA fiduciary damage liability, plan participants have recourse against non-fiduciaries who engage in improper conduct. A non-fiduciary who engages in a prohibited transaction is subject to a civil action to "correct" the transaction and prevent unjust enrichment. The non-fiduciary is also subject to punitive taxation and fines for having engaged in the prohibited transaction. If the violation does not involve a prohibited transaction, appropriate equitable relief, such as injunctive or restitutionary relief, is available against a non-fiduciary. Finally, actuaries are subject to a specific ERISA regulatory and disciplinary scheme which has no provision for damages.

ERISA's legislative history is replete with evidence that Congress, knowing the contribution actuaries would make to ERISA plans, nevertheless chose not to make actuaries subject to ERISA fiduciary damage liability. While requiring the Secretaries of Labor and Treasury to establish rules and regulations for actuaries, Congress decided not to dictate specific actuarial assumptions and methods because of its unwillingness to "straitjacket" ERISA actuaries. Congress recognized that the choice of appropriate actuarial assumptions should remain a matter of professional judgment.

Instead of subjecting actuaries and other non-fiduciary service providers to ERISA fiduciary damage liability suits, Congress struck a careful balance between its desire to protect plan participants and its reluctance to unduly increase pension costs.

Congress' intentional omission of a participant's right to maintain a civil action seeking to impose damage liability on non-fiduciaries for their knowing participation in a fiduciary breach is further demonstrated by Congress' recent rejection of a proposed ERISA amendment that would have imposed precisely such liability on non-fiduciaries. This Court should not find that such a cause of action exists when Congress specifically refused to create one.

II.

Petitioners and the Solicitor General contend that since equity courts traditionally awarded damages for breaches of trust, the compensatory and punitive damages sought here are "appropriate equitable relief." (Pets' Br. at 24 n.5; SG Br. at 10-18.) In making that argument, Petitioners and the Solicitor General confuse equitable "relief" and equitable "jurisdiction." Because equity courts had exclusive jurisdiction over trust cases at common law, they could award both equitable and legal relief. However, common law damages are not transformed from a legal remedy into an equitable one merely because courts of equity award them. This Court's prior rulings, together with ERISA's plain language, structure and legislative history, demonstrate that when Congress used the phrase "appropriate equitable relief" in ERISA § 502(a)(3), it meant exactly what it said: plan participants can obtain only injunctive, declaratory or other appropriate equitable relief from a non-fiduciary.

The references in ERISA's legislative history to the common law of trusts do not justify the wholesale importation from the common law of a damages cause of action that is absent from ERISA's plain language, and unsupported by the history, purpose and structure of the statute.

Nor does the federal common law provide a basis for creating a cause of action that Congress deliberately chose not to enact. The federal common law is invoked only rarely, and then only in areas where Congress has not already spoken. Here, Congress "spoke" by declining to impose fiduciary damage liability on non-fiduciaries. Under these circumstances, the federal common law cannot be used to supplement the explicit and exclusive remedies set forth in ERISA § 502(a).

ERISA § 502(l), 29 U.S.C. § 1132(l) (Supp. II 1990), which permits the Secretary of Labor to assess a civil penalty against fiduciaries who breach their duties and "other persons" who participate in an ERISA fiduciary breach, is not authority for the contention that Congress intended to permit plan participants to seek money damages from non-fiduciaries. ERISA § 502(l) applies only to the Secretary of Labor. That section gives the Secretary the power to assess civil penalties. It does not authorize the Secretary, much less participants, to maintain a civil action to impose damage liability on a non-fiduciary who knowingly participates in a fiduciary breach. The legislative history of § 502(l) confirms that Congress never intended to provide participants with such a cause of action.

Russell's pronouncement that courts should not engraft causes of action Congress chose not to incorporate into ERISA's remedial scheme remains controlling, and this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), is not to the contrary. To reverse the Ninth Circuit, this Court would have to ignore its admonition in *Russell.*

Finally, Petitioners have abandoned any claim for equitable relief in this case. In affirming the dismissal of Petitioners' ERISA claims, the Ninth Circuit found that Petitioners did not state an equitable restitution claim under § 502(a)(3) because they had not alleged that Hewitt received anything other than normal compensation for its actuarial services. (J.A. 44.) Moreover, it found that no direct link existed between the loss complained of and the recovery sought, since Hewitt was paid by Kaiser, not out of Plan assets. (J.A. 45.) Petitioners did not seek review of that portion of the Ninth Circuit's decision in this Court.

ARGUMENT

I. ERISA DOES NOT PERMIT PLAN PARTICIPANTS TO MAINTAIN A CIVIL ACTION SEEKING MONEY DAMAGES FROM NON-FIDUCIARIES.

A. ERISA'S PLAIN LANGUAGE DOES NOT ALLOW RECOVERY OF DAMAGES FROM NON-FIDUCIARIES.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Petitioners concede that ERISA's explicit language does not permit plan participants to bring a suit for damages against a non-fiduciary service provider who allegedly participates knowingly in a fiduciary breach. (*See* Petition for Writ of Certiorari ("Cert. Pet.") at 9.) Nevertheless, Petitioners contend that Congress had an "original intent to impose [such] liability on aiders and abettors of fiduciary breaches." (Pets' Br. at 9.)[6]

Given their admission, Petitioners' task is an extraordinarily difficult one. "Absent a *clearly expressed legislative intention to the contrary*, [a statute's] language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n*, 447 U.S. at 108 (emphasis added). "The '*strong presumption*' that the plain language of the statute expresses congressional intent is rebutted only in '*rare and exceptional circumstances*.' " *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (emphasis added) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Where the statutory text is clear, the burden

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[6] In their Brief, Petitioners characterize the relief they seek as "monetary" or "make whole" relief (Pets' Br. at 10, 15, 19), or as an attempt to recover "losses" allegedly suffered (Pets' Br. at 18). Because Petitioners' Complaint seeks, *inter alia*, punitive damages and recovery by the plaintiff class of "all losses" resulting from Hewitt's alleged ERISA breach (J.A. 15), Petitioners are, in fact, plainly seeking "money damages."

on a party proposing a statutory interpretation at odds with the text is "*exceptionally heavy*." *Union Bank v. Wolas*, 112 S. Ct. 527, 530 (1991) (emphasis added).[7]

ERISA § 502(a) is the civil enforcement provision of the statute. It specifies six civil actions that may be maintained by plan participants, beneficiaries, fiduciaries or the Secretary of Labor. These "six carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, 473 U.S. at 146 (emphasis in original). None of § 502(a)'s provisions authorizes a plan participant to maintain an action seeking damages, as opposed to equitable relief, from non-fiduciaries.[8] "The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' " *Id.* (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)).

Because of ERISA's comprehensive and reticulated nature, and because of the "deliberate care" with which it was drafted, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), this Court's ERISA decisions demonstrate a special

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[7] *See also Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) ("we have considered ourselves bound to 'assume that the legislative purpose is expressed by the ordinary meaning of the words used.' ") (quoting *INS v. Phinpathya*, 464 U.S. 183, 189 (1984)).

[8] The relevant portions of ERISA § 502(a) provide that "a civil action may be brought . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109 (1988)]; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

concern with effectuating the plain meaning of the words chosen by Congress.

Most recently, in *District of Columbia v. Greater Washington Bd. of Trade*, No. 91-1326, 1992 WL 362797, at *3 (U.S. Dec. 14, 1992), for example, this Court relied on the plain meaning of ERISA § 514(a) in holding that ERISA preempted a District of Columbia statute which required employers who provide health insurance for their employees to furnish equivalent coverage to injured employees eligible for workers' compensation benefits. Last term, in *Patterson v. Shumate*, 112 S. Ct. 2242, 2247-48 (1992), this Court relied on the plain language of ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988), in holding that an anti-alienation provision in a plan which accorded with § 206(d)(1) satisfied the "literal terms" of the exclusion of property from bankrupt estates in § 541(c)(2) of the Bankruptcy Code. And in *PBGC v. LTV Corp.*, 496 U.S. 633, 645 (1990), this Court upheld the PBGC's decision to restore LTV's terminated pension plans based on the "plain language of [ERISA] § 4047 [29 U.S.C. § 1347 (Supp. II 1990)]" despite the contention that that decision defeated the "policies and goals" of federal bankruptcy and labor law.

ERISA's "plain language" likewise should control this case.

B. ERISA'S STRUCTURE CAREFULLY DISTINGUISHES FIDUCIARIES FROM NON-FIDUCIARIES.

ERISA establishes "standards of conduct, responsibility and obligation for *fiduciaries* of employee benefit plans. . . ." ERISA § 2(b), 29 U.S.C. § 1001(b) (1988) (emphasis added). An employee benefit plan must "provide for one or more named fiduciaries who . . . shall have authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988). Those named fiduciaries can allocate fiduciary responsibility among themselves, and are permitted to designate other persons to carry out fiduciary obligations. ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1) (1988).

Apart from those named or designated, a person will be deemed an ERISA fiduciary to the extent he exercises discretionary authority, responsibility, or control respecting the management or administration of a plan. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988). This "seemingly complex definition of 'fiduciary' . . . carefully directs attention away from the title and *toward the function*. . . . The definition is discretion-centered." John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 496-97 (1990) (emphasis added). Congress thus broadly imposed fiduciary status on those persons who exercise discretionary authority or control over a plan or its assets. In doing so, Congress ensured that plan participants would always have a fiduciary to hold accountable for losses sustained as a result of a breach of fiduciary obligations. Because of their discretionary authority and control, fiduciaries who breach their obligations are subject to personal liability for any losses sustained, are required to disgorge any profits garnered through use of plan assets, and are subject to "other equitable or remedial relief . . . including removal. . . . " ERISA § 409(a), 29 U.S.C. § 1109(a) (1988).

However, accountants, actuaries, lawyers and other professionals who render services to an employee benefit plan are *not* fiduciaries under ERISA unless they also exercise discretionary authority or control over the management or administration of a plan or its assets. *See* 29 C.F.R. § 2509.75-5 (1992). Significantly, the House rejected a proposed amendment that would have made ERISA's fiduciary provisions expressly applicable to actuaries, preferring instead the discretion-centered functional approach set forth in ERISA § 3(21)(A). *See* Employee Benefit Security Act of 1974: Material Explaining H.R. 12906 Together with Supplemental Views, *reprinted in* 2 Legislative History of the Employee Retirement Income Security Act of 1974 at 3293, 3309 (1976).[9]

[9] As the Conference Committee stated:

> *While the ordinary functions of consultants and advisers to [plans] may not be considered as fiduciary functions*, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, *be exercising discretionary authority or control with respect to the management or administration of [a plan]* or some authority or control regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 323, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5103 (emphasis added).

Since Petitioners' Complaint only reflected that Hewitt performed actuarial services for the Plan and contained no allegations indicating that Hewitt exercised any discretionary authority or control over the Plan, the Ninth Circuit found that Hewitt was not an ERISA fiduciary. (J.A. 39-41.) Nevertheless, through their "knowing participation claim," Petitioners are seeking to subject Hewitt to the same money damage fiduciary liability set forth in ERISA § 409(a). By doing so, they seek to erase the careful distinction Congress crafted between fiduciaries and non-fiduciaries. Under their scheme, it would make no difference whether a service provider merely performed its statutorily mandated functions, or "crossed the line" and exceeded the normal scope of authority by exercising discretionary authority over a plan. In either case, Petitioners and the Solicitor General would hold the non-fiduciary service provider subject to the same civil money damage liability as a fiduciary.

That is not what Congress intended. Under the civil enforcement scheme set forth in ERISA § 502(a), Congress elected to permit plan participants to maintain civil actions seeking the recovery of money damages against fiduciaries only. However, Congress provided participants with other specific remedies and causes of action under ERISA which they can pursue against non-fiduciaries who engage in improper conduct.

A non-fiduciary who falls within the statutory "party in interest" definition (by providing services to a plan, for example) is forbidden from engaging in certain "prohibited transactions." *See* ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B)

(1988); ERISA § 406. If the non-fiduciary engages in a "prohibited transaction," it is subject to a civil action seeking "correction" of the transaction to prevent unjust enrichment. I.R.C. §§ 4975(f)(5), (h), 26 U.S.C. §§ 4975(f)(5), (h) (1988). In addition, the non-fiduciary service provider is subject to punitive taxation and fines for having engaged in the prohibited transaction. ERISA § 502(i), 29 U.S.C. § 1132(i) (1988); I.R.C. § 4975, 26 U.S.C. § 4975 (1988). Moreover, even if the non-fiduciary is not a party-in-interest (and hence not subject to ERISA's prohibited transaction rules), it can be sued by plan participants under ERISA § 502(a)(3) for injunctive, declaratory, restitutionary or other appropriate equitable relief for violations of other ERISA provisions or the terms of a plan.[10]

In the case of non-fiduciary providers of actuarial services, Congress established an even more refined regulatory and remedial scheme. To be eligible to furnish services to an employee benefit plan, actuaries must be licensed by the Joint Board for the Enrollment of Actuaries ("JBEA"). ERISA § 3042, 29 U.S.C. § 1242 (1988). Hewitt's licensed "enrolled" actuary for the Plan was at all times under an affirmative duty to adhere to standards of performance for actuarial services promulgated by the JBEA, pursuant to its authority under ERISA § 3042.[11] The JBEA regulations enacted in the wake of ERISA's passage are exhaustive in scope, and impose strict

[10] For example, if a non-fiduciary wrongfully obtains plan assets by theft or through other means, plan participants could maintain an action to obtain restitution of the misappropriated assets under § 502(a)(3). As this Court has recognized, "[a] fair contextual reading of [ERISA] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets. . . . " *Russell*, 473 U.S. at 142.

[11] Specifically, ERISA directs the JBEA to "establish reasonable standards and qualifications for persons performing actuarial services with respect to plans to which this Act applies. . . . " ERISA § 3042(a). The Act empowers the JBEA, "after notice and an opportunity for a hearing", to "suspend or terminate" the enrollment of an actuary if the actuary has, *inter alia*, "failed to discharge his duties under this Act. . . . " ERISA § 3042(b)(1).

standards of professional conduct on enrolled actuaries.[12] Moreover, they create an elaborate process for adjudicating complaints against enrolled actuaries.[13] In addition, ERISA imposes affirmative obligations on actuaries relating to their determination of a plan's actuarial assumptions.[14] Despite (or,

[12] Under the regulations, an enrolled ERISA actuary may, *inter alia*, undertake an actuarial assignment only when qualified to do so, and may not perform services for a person whom he believes may utilize his services fraudulently. 20 C.F.R. § 901.20 (1992). In addition, an enrolled actuary may not perform services when he has a conflict of interest without full disclosure to the plan's participants and beneficiaries, and he must take steps to ensure that his assumptions, calculations and recommendations are made with due care, skill, prudence and diligence. *Id.* Violations of these standards can result in the suspension or termination of the actuary's enrolled status. § 901.30.

[13] The regulations provide for the receipt of complaints concerning an enrolled actuary by the JBEA's Executive Director (20 C.F.R. § 901.32 (1992)); institution of proceedings against an enrolled actuary by the Executive Director (§ 901.33); formal pre-litigation conferences between the Director and the accused actuary (§ 901.34); the filing of complaints and answers (§§ 901.35, 901.37); pre-hearing motions (§ 901.41); discovery depositions (§ 901.46); and hearings presided over by an administrative law judge. (§§ 901.43, 901.44, 901.45.)

Actuaries providing services to ERISA plans are also regulated by the Internal Revenue Code. *See* I.R.C. § 6059, 26 U.S.C. § 6059 (1988) (setting forth detailed requirements for actuarial reports that ERISA requires be filed by plans with the IRS.)

[14] For example, ERISA requires that "all costs, liabilities, rates of interest, . . . be determined on the basis of actuarial assumptions and methods (A) . . . each of which is reasonable (taking into account the experience of the plan and reasonable expectations) or which, in the aggregate, result in a total contribution equivalent to that which would be determined if each such assumption and method were reasonable . . . (B) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." ERISA § 302(c)(3), 29 U.S.C. § 1082(c)(3) (1988). An enrolled actuary must prepare an actuarial statement for the plan that utilizes "such assumptions and techniques as are necessary to enable him to form an opinion" that the actuarial assumptions and methods utilized "are in the aggregate reasonably related to the experience of the

perhaps, because of) this extensive regulation of actuaries, Congress chose not to subject them to ERISA's fiduciary standards and attendant personal damage liability. This Court should not presume that Congress accidentally omitted providing a damage cause of action against actuaries from the statute.

> The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 645 (1981) (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981)).[15]

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plan and to reasonable expectations" and that the results "represent his best estimate of anticipated experience under the plan." ERISA § 103(a)(4)(B), 29 U.S.C. § 1023(a)(4)(B) (1988).

[15] This fundamental limit on the scope of ERISA's remedial scheme has been recognized repeatedly. *See Nieto*, 845 F.2d at 874 (no damage claim against non-fiduciaries exists under ERISA); *Useden v. Acker*, 947 F.2d 1563, 1580 (11th Cir. 1991) (same), *petition for cert. filed*, 60 U.S.L.W. 3843 (U.S. June 1, 1992) (No. 91-1944); *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 744 F. Supp. 29, 31-33 (D. Mass. 1990) (same). *Accord* David L. Bacon et al., Employee Benefits Guide § 7.13[2], at 7-72 (1992) ("The better reasoned view is that ERISA does not permit a suit for damages against a non-fiduciary."). *Cf. Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1152 (3d Cir. 1989) (refusing to imply a private right of action against non-fiduciary under ERISA); *Flacche v. Sun Life Assurance Co.*, 958 F.2d 730, 737 (6th Cir. 1992) (rejecting private right of action for extra-contractual damages against non-fiduciary under ERISA).

Petitioners contend that six circuit courts have considered the question presented by their Petition and that four of those courts have concluded that ERISA provides a private right of action against non-fiduciaries for knowing participation in a breach of fiduciary duty. (Pets' Br. at 18, 20.) The existence of a private right of action, however, is not the issue. The issue is the availability of damages. Only a few of the decisions cited by Petitioners even reach that question. *Compare Brock v. Hendershott*, 840 F.2d 339, 341 (6th Cir. 1988) (action brought by Secretary of Labor seeking only equitable restitutionary relief) *with Thornton v. Evans*, 692 F.2d 1064, 1079-80 (7th Cir. 1982) (sustaining damages claim against non-fiduciaries on a conspiracy theory). Moreover, none of those decisions is well-considered. All ignore or minimize the plain language and structure of the statute. *See, e.g., Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985). Finally, almost all pre-date the rejection of a proposed amendment that would have permitted damages actions against non-fiduciaries for knowing participation in a fiduciary breach. (*See infra* pp. 23-25.)

C. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS DID NOT INTEND TO PROVIDE PLAN PARTICIPANTS WITH THE RIGHT TO SEEK DAMAGES FROM NON-FIDUCIARIES.

ERISA's legislative history demonstrates that the statute's plain language and structure were not arrived at accidently. That history is replete with evidence that Congress recognized the contribution actuaries would make to ERISA plans and that there was a lack of effective existing actuarial regulation.[16] Congress nevertheless chose *not* to make actuaries liable for damages.

Congress decided not to dictate specific actuarial assumptions and methods precisely because of its unwillingness to "straitjacket" ERISA actuaries and plans.[17] That

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[16] *See, e.g.*, H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4670, 4758 ("[T]here is no existing government regulation of the actuarial profession. . . . To resolve this problem, the bill provides that standards and qualifications are to be established for enrolling actuaries to practice before the Internal Revenue Service. . . ."). *See also* S. Rep. No. 383, 93d Cong., 2d Sess. 68, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4952; S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted* in 1974 U.S.C.C.A.N. 4838, 4853.

[17] As the Senate Report on ERISA stated:

> *Conceivably an attempt might be made to secure uniform application of the minimum funding standards by authorizing the Secretary of the Treasury or some other authority to establish the specific actuarial assumptions and methods that could be used by pension plans.* This would involve, for example, setting a specific rate of interest that could be used by certain

desire stemmed from Congressional recognition that "frequently there is a range of actuarial assumptions which may be appropriate for determining the costs of a defined benefit pension plan, and the choice of the appropriate assumptions is very much a *matter of judgment*." H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4670, 4760-4761 (emphasis added).

One of ERISA's important goals is "containing pension costs." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981). Permitting damages suits against service providers would undermine that goal by raising the cost of services to plans and, ultimately, to participants.

Congress' concern with not unduly increasing the costs of private pension plans is apparent from the legislative history. *See* H.R. Rep. No. 779, 93d Cong., 2d Sess. 15, *reprinted in* 2 Legislative History of the Employee Retirement Income Security Act of 1974 at 2604 ("the committee has sought to adopt provisions which *strike a balance between providing meaningful reform and keeping costs within reasonable limits*") (emphasis added). *See also Alessi*, 451 U.S. at 516 n.12 (increased pension costs " 'not the intent of this legislation which is designed to improve and encourage the expansion of private pension plans' ") (quoting 120 Cong.

> pension plans or by specifying certain turnover rates for specified types of firms. *However, the committee does not believe that this would be an appropriate procedure, since the proper actuarial assumptions may differ substantially between industries, among firms, geographically, and over time.* Further, in estimating plan costs each actuarial assumption may be reasonable over a significant range and it would appear that the proper test would be whether all actuarial assumptions used together are reasonable. These considerations strongly indicate that *any attempt to specify actuarial assumptions and funding methods for pension plans would in effect place these plans in a straitjacket* so far as estimating costs is concerned, and would be likely to result in cost estimates that are not reasonable.

S. Rep. No. 383, 93d Cong., 2d Sess. 23-24, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4909 (emphasis added).

Rec. 29928 (1974), *reprinted in* 3 Legislative History of the Employee Retirement Income Security Act of 1974 at 4732). While benefitting participants is also one of ERISA's primary goals, it would be inappropriate to use that as a justification for creating a cause of action that Congress intentionally omitted and for ignoring equally compelling statutory policies that counsel against such judicial invention.

The balance struck between reform and costs is reflected throughout ERISA, but most notably in § 3(21)(A) where Congress adopted a functional approach for determining whether someone is a fiduciary. By excluding service providers who do not exercise the requisite discretionary control over a plan from the fiduciary definition, Congress chose to insulate them from open-ended and intrusive damage suits based on what are often highly technical matters of judgment. However, in order to avoid tilting the balance unfairly in favor of non-fiduciaries, Congress allowed plan participants to seek "appropriate equitable relief" from non-fiduciaries, subjected non-fiduciaries who are parties-in-interest to the prohibited transaction rules (including punitive taxation and fines), and, in the case of actuaries in particular, provided disciplinary procedures for termination or suspension of their licenses in appropriate circumstances.

The balance struck by Congress should not be judicially upset. As this Court has observed:

> *[N]o legislation pursues its purposes at all costs.* Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and *it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.*

PBGC v. LTV Corp., 496 U.S. at 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis added)).

In *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), this Court rejected the Solicitor General's argument that ERISA § 515, 29 U.S.C. § 1145 (1988) – which obligates employers to make

contributions to a multiemployer plan under the terms of a collectively bargained agreement – should be construed broadly to include post-contract delinquencies because of ERISA's policy of benefitting participants.

> Our principal reason for rejecting these arguments is our conviction that *Congress' intent is so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it.*

484 U.S. at 551 (emphasis added). Here, as in *Advanced Lightweight Concrete*, there is no legitimate basis to alter the "policy" choices already made by Congress.

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. *Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.*

Texas Indus., 451 U.S. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) (emphasis added)).[18]

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[18] Petitioners previously argued that a private right of action against non-fiduciaries which permits the recovery of money damages should be implied under *Cort v. Ash*, 422 U.S. 66 (1975). (Cert. Pet. at 9-10.) They have now apparently abandoned that position, since *Cort* is not even cited in their Brief. They did so for good reason. "In this case, the essential predicate for implication of a private remedy plainly does not exist." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). "[T]he context, language, and legislative history . . . all point sharply away from the remedy petitioner urges [the Court] to infer." *Id.* at 180. Where " 'neither the statute nor the legislative history reveals a congressional intent to create a private right of action . . . we need not carry the *Cort v. Ash* inquiry further.' " *Russell*, 473 U.S. at 148 (1985) (quoting *Northwest Airlines, Inc.*, 451 U.S. at 94 n.31).

D. REJECTION OF THE "*NIETO*" AMENDMENT FURTHER DEMONSTRATES CONGRESS' INTENT.

Congress' intention not to permit participants to seek money damages from a non-fiduciary is confirmed by its recent rejection of a proposed amendment that would have explicitly created such a cause of action under ERISA. That amendment, which would have been part of the Omnibus Budget Reconciliation Act of 1989 ("OBRA"), would have added a new § "(c)" to ERISA § 409, providing that:

> Any person who participates knowingly in, or knowingly undertakes to conceal, an act or omission of a fiduciary with respect to a plan, knowing such act or omission is a breach of fiduciary responsibility to such plan, shall be personally liable to the plan for such breach of fiduciary responsibility in the same manner and to the same extent as if such person were a fiduciary committing such breach.

H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989).[19]

OBRA's legislative history demonstrates that the proposed amendment was drafted specifically to overrule *Nieto*, the decision upon which the Ninth Circuit based its ruling in this case. (*See* J.A. 45.) H.R. Rep. No. 247, 101st Cong., 1st Sess., *reprinted in* 1989 U.S.C.C.A.N. 1906, 1969-70. Yet, the proposed amendment was deleted from the bill Congress ultimately enacted, thereby evidencing Congressional intent to preserve ERISA's ban on private damages actions against non-fiduciaries. *See Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988) ("Once Congress was sufficiently aware

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[19] If this amendment had passed, plan participants could have maintained a civil action against a knowing participant for money damages under ERISA § 502(a)(2). Since it was not enacted, Petitioners appear now to recognize that such an action cannot be maintained under ERISA § 502(a)(2). That provision only permits plan participants to sue for appropriate relief under ERISA § 409. By its express terms, § 409 only applies to "any person who is a *fiduciary*. . . . " (Emphasis added.) The Solicitor General concedes that § 502(a)(2) is not relevant. (SG Br. at 9.)

of [an issue] – as evidenced by its adoption of [a limited provision on that issue] – Congress' decision to remain silent concerning [the issue] 'acknowledged and accepted the practice, rather than prohibiting it.' ") (quoting *Alessi*, 451 U.S. at 516). At the very least, Congress' rejection of the "*Nieto*" amendment demonstrates that Petitioners have not met their "exceptionally heavy" burden of demonstrating a "clearly expressed" legislative intention to create such a cause of action.[20]

Citing *PBGC v. LTV Corp.*, 496 U.S. at 650, Petitioners assert that Congress' failure to enact the proposed "*Nieto*" amendment "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.' " (Pets' Br. at 17.) Petitioners' reliance on *LTV* is misplaced.

This is not a case where Congress merely failed to act. By enacting § 502(l) (which authorized only the Secretary of Labor to assess civil penalties for any breach of fiduciary duty or knowing participation in such a breach), Congress did, in fact, act – although not in the manner Petitioners' wish. That Congress chose to enact § 502(l), and, in the same session, declined to enact the "*Nieto*" amendment, is persuasive evidence that Congress' decision not to permit plan participants to maintain damages actions against non-fiduciaries was deliberate.

Moreover, in *LTV*, this Court declined to rely on Congress' failure to amend ERISA to authorize the PBGC to

[20] *See also Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (Congress' failure to enact proposed amendment "strongly militates against a judgment that Congress intended a result that it expressly declined to enact."); *Tanner v. United States*, 483 U.S. 107, 125 (1987) (finding it significant that Congress had considered and rejected proposed rule of evidence); *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 544 n.44 (1979) (finding it significant that Congress considered and rejected proposed amendments to the Labor Management Relations Act).

prohibit so-called "follow-on" plans, in part, because of Congress' "awareness" that the PBGC was already consistently doing so. 496 U.S. at 650. Thus, no practical purpose would have been served by Congressional action. In stark contrast to this case, the PBGC's existing interpretation of its authority in *LTV* was clear and consistent; no circuit conflict existed subjecting similarly situated persons to different standards of conduct.[21]

II. PETITIONERS' ATTEMPT TO REWRITE ERISA IS WITHOUT LEGAL FOUNDATION.

A. ERISA § 502(a)(3) LIMITS PLAN PARTICIPANTS TO OBTAINING EQUITABLE RELIEF FROM NON-FIDUCIARIES.

Petitioners and the Solicitor General claim that common law equity courts traditionally allowed for "make whole" relief, including, if necessary, money damages against a knowing participant in a fiduciary breach. (Pets' Br. at 24 n.5; SG Br. at 10-18.) Since monetary relief was once available in courts of equity, Petitioners reason that a federal court may award such relief against non-fiduciaries under § 502(a)(3)'s "appropriate equitable relief" provision. Their argument, however, is premised on the mistaken notion that the historical scope of equitable *jurisdiction* defines the permissible scope of modern day equitable *relief* available under § 502(a)(3).

[21] *See also Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987) (finding it significant that Congress had not chosen to overrule Supreme Court's prior judicial interpretations of congressional statute); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.").

Damages were available "in courts of equity because those courts had *exclusive jurisdiction* over actions involving a trustee's breach of his fiduciary duties." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1348 n.8 (1990) (emphasis added). Not surprisingly in light of its exclusive jurisdiction, an equity court was free to "go on to a complete adjudication, and . . . establish purely legal rights and grant *legal remedies* which would otherwise be beyond the scope of its authority." 1 John N. Pomeroy, Equity Jurisprudence § 181, at 257 (5th ed. 1941) (emphasis added). Equity courts awarded the legal remedy of damages as an ancillary measure in order to resolve the case in a single forum. There was no suggestion thereby that damages somehow became a form of "equitable relief." Thus, contrary to Petitioners' suggestion, it does not follow that when Congress granted plan participants the right to obtain "appropriate equitable relief" from non-fiduciaries, it meant for such relief to include money damages – a form of relief which is patently non-equitable under today's jurisprudence. To hold otherwise would fly in the face of ERISA's plain language, structure and legislative history.

This fundamental flaw in Petitioners' argument was recognized by this Court recently in analogous circumstances. *Terry*, 110 S. Ct. 1339 (1990). In *Terry*, the issue was whether the employees seeking back pay for the union's breach of its duty of fair representation had a right to a jury trial. The union argued that the employees were not entitled to a jury trial because the recovery sought was equitable, since it was "closely analogous to damages awarded to beneficiaries for a trustee's breach of trust." *Id.* at 1348 n.8. In response, however, this Court noted that "[s]uch damages were available only in courts of equity because those courts had exclusive jurisdiction over actions involving a trustee's breach of his fiduciary duties." *Id.* (citations omitted). Thus, this Court held:

> The Union's argument . . . conflates the two parts of our Seventh Amendment inquiry. . . . [I]f the action at issue were analogous to an 18th-century action within the exclusive jurisdiction of the courts of equity, we would necessarily conclude that the remedy sought was also equitable because it would have been unavailable in a court of law. This view would, in effect, make the first part of our inquiry dispositive. We have clearly held, however, that the second part of the inquiry – *the nature of the relief* – is more important to the Seventh Amendment determination.

Id. (emphasis added). Since the employees sought money damages, not equitable relief, this Court concluded that they were entitled to a jury trial. *Id.* at 1349.

Just as in *Terry*, Petitioners here seek "legal" relief. The Solicitor General concedes that the "make-whole monetary damages" sought by Petitioners "resemble compensatory damages awarded in courts of law. . . . " (SG Br. at 6.) It is well-settled that "[c]ompensatory damages are a classic form of *legal*, not equitable relief." *Harsch v. Eisenberg*, 956 F.2d 651, 656 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992) (emphasis in original). While equity courts awarded such damages because of their exclusive jurisdiction over trust cases at common law, it would defy the reasoning of *Terry*, and would be inconsistent with the "ordinary meaning" of the terms chosen by Congress, to hold that plan participants can recover money damages under § 502(a)(3) when the statute's plain words limit them to obtaining only "appropriate equitable relief."

Petitioners' and the Solicitor General's interpretation ignores the distinction between "equitable relief" and "equitable jurisdiction." Under their interpretation, the word "equitable" as used in § 502(a)(3) would be made to mean the opposite of what a reasonable person thinks it means. It is, therefore, not surprising that none of the myriad of common law trust cases cited by Petitioners or the Solicitor General awarded money damages in the face of a Congressional statute expressly limiting redress to "appropriate equitable relief." (Pets' Br. at 27-28; SG Br. at 13-16.)

This Court has characterized damages as equitable relief in only two situations: where they are "restitutionary," *Terry*, 110 S. Ct. at 1348, and where they are " 'incidental to or

intertwined with injunctive relief.'" *Id.* (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)). Here, of course, Petitioners seek neither restitution nor an injunction. Instead, they are merely trying to recover money damages as recompense for injuries allegedly sustained as a result of Hewitt's purported improper conduct; archetypal "legal" – not "equitable" – relief.

That Congress intended the term "appropriate equitable relief" as used in § 502(a)(3) to retain its plain meaning is once again confirmed by the legislative history.[22] In its report on ERISA, the Senate Finance Committee pointed out that:

> Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets . . . . Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary [of Labor] or participants or beneficiaries . . . .

S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4890, 4989. Based in part on this passage, the vast majority of courts have held that "appropriate equitable relief" under § 502(a)(3) does not include extra-contractual damages. *See, e.g., Sokol v. Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986) ("[I]t appears that Congress used the word 'equitable' to mean what it usually means – injunctive or declaratory relief.")[23] The rationale of these decisions extends to claims for "contractual" compensatory damages.

[22] The placement of the phrase "*other* appropriate equitable relief" leads inevitably to the same conclusion. The phrase appears immediately after the provision granting plan participants the right to seek an *injunction* to prevent further violations of the Act, reflecting that the "*other*" appropriate equitable relief intended by Congress was akin to the just-mentioned injunctive remedy.

[23] *See also McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 (11th Cir. 1991); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S.

In *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3156 (U.S. Aug. 26, 1992) (No. 92-352), the Eighth Circuit directly held that a claim for "contractual" compensatory damages could not be pursued under § 502(a)(3).

> [Plaintiff] claims he is not seeking legal relief at all, but equitable relief under § 502(a)(3)(B), and that the only "appropriate equitable relief" is monetary damages. *We do not disagree with [Plaintiff's] assertion that monetary damages may indeed be the only appropriate relief in this case. We do disagree, however, with his proposition that an award of monetary damages is equitable relief under ERISA.*

962 F.2d at 759 (emphasis added). As the Eighth Circuit recognized, the sole issue is whether the relief requested by a party invoking § 502(a)(3) is contemplated by the phrase "other appropriate equitable relief." That term is simply not broad enough to encompass the award of money damages. *Id.* at 760. *See also First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546, 1553 (11th Cir. 1992) ("We must reject [the] argument that the phrase 'equitable relief' in § [502](a)(3) authorizes an award of compensatory damages. The omission of any mention of a right to legal remedies in § [502](a)(3) must be taken as an indication of Congress' intent to limit the relief available under this section to that which is equitable in nature.") (footnote omitted), *petition for cert. filed*, 61 U.S.L.W. 3371 (U.S. Oct. 28, 1992) (No. 92-755).

Further guidance on the meaning of "appropriate equitable relief" is provided by the interpretation of similar language in other statutes. *See generally West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1141-43 (1991) (interpreting fee-shifting provision of the Civil Rights Act of 1964, 42 U.S.C. § 1988, by examining similarly phrased fee-shifting provisions in other federal statutes). The precise phrase

1170 (1986); *Harsch*, 956 F.2d at 660; *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1464 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987).

"other appropriate equitable relief" appears only once elsewhere in the United States Code. *See* 43 U.S.C. § 618h (1988). There has been no occasion for a court to interpret the language as used in that statute. However, prior to enactment of the Civil Rights Act of 1991, the relief provisions of Title VII, 42 U.S.C. § 2000e-5(g) (1988), used substantively identical language providing that a federal court could enjoin unlawful employment practices "and order such affirmative action as may be appropriate, which may include, . . . any *other equitable relief as the court deems appropriate*." *Id.* (emphasis added).

Federal courts interpreting the phrase "other equitable relief as the court deems appropriate" uniformly have held that money damages are *not* available under Title VII.[24] In fact, this Court recently held that "Title VII does not allow awards for compensatory or punitive damages." *United States v. Burke*, 112 S. Ct. 1867, 1873 (1992).

The unavailability of money damages under Title VII (as distinct from equitable remedies) was well-established *prior to* ERISA's enactment. *See Curtis v. Loether*, 415 U.S. 189, 197 (1974) ("Whatever may be the merit of the 'equitable' characterization in Title VII cases, *there is surely no basis for characterizing [an] award of compensatory and punitive damages . . . as equitable relief.*") (emphasis added). *See also Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969). This prior judicial interpretation of "appropriate" equitable relief must be considered in ascertaining what Congress intended when it included a substantially identical phrase in § 502(a)(3). *See generally Casey*, 111 S. Ct. at 1143-46. *See also Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992) (" '[w]here Congress uses terms that have accumulated settled meaning under . . .

[24] *See, e.g., Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 197 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 581 (2d Cir. 1989).

the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' ") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)). *Cf. Lorillard v. Pons*, 434 U.S. 575, 583 (1978) ("The word 'legal' is a term of art. . . . We can infer, therefore, that by providing specifically for 'legal' relief, Congress knew the significance of the term 'legal'. . . . ").[25]

If plan participants are allowed to maintain civil actions seeking money damages from non-fiduciaries, ERISA's carefully crafted structure will be overridden and much of ERISA's enforcement scheme rendered surplusage. If the full range of equitable *and* legal causes of action is available to plan participants under the rubric of "appropriate equitable relief," then why did Congress so carefully delineate the circumstances under which a service provider could become a fiduciary through the functional test adopted in ERISA § 3(21)(A)? If the damages actions available to plan participants who bring breach of fiduciary duty claims under § 502(a)(2) and § 409(a) are also available against non-fiduciaries in an action for "appropriate equitable relief" under § 502(a)(3), how does this Court avoid concluding that §§ 502(a)(2) and 409(a) are unnecessary surplusage? *See Nieto*, 845 F.2d at 873 ("Permitting recovery of damages under section 502(a)(3) would render section 409(a) superfluous, a result contrary to a fundamental canon of statutory construction.").

[25] In *Burke*, 112 S. Ct. at 1874 n.12, this Court observed that Congress' decision to permit compensatory and punitive damages under the 1991 Civil Rights Act "signal[led] a marked change in its conception of the injury redressable by Title VII." Significantly, the Court quoted the Report of the House Committee on Education and Labor which had observed, in connection with the 1991 amendment of Title VII's remedial provisions, that: " '*Monetary damages* also are necessary to make discrimination victims whole . . . . ' " *Id.* (quoting H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 64-65, *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03) (emphasis added). Thus, Congress clearly understands that there is a meaningful difference between the terms "equitable relief" and "monetary damages."

The Solicitor and the other Amicus Curiae supporting Petitioners argue that the remedies authorized by § 409 places a "floor" under the type of relief available pursuant to ERISA and that § 502(a)(3) "complete[s] the scheme, by broadly authorizing courts to develop other remedies as appropriate." (SG Br. at 24-25; *see also* Brief Amicus Curiae of American Association of Retired Persons in Support of Petitioners at 9-10.) This position represents a dangerous, expansive and unprincipled interpretation of ERISA. Moreover, if § 409(a) represents a "floor" below which no ERISA remedy against a fiduciary may fall, § 502(a)(3)'s "*equitable* relief" limitation is a "ceiling" above which no ERISA remedy against a non-fiduciary may rise. By seeking money damages under § 502(a)(3), Petitioners are impermissibly trying to crack that ceiling.

B. THE COMMON LAW OF TRUSTS HAS LIMITED APPLICABILITY AND CANNOT BE USED TO OVERRIDE EXPRESS STATUTORY TERMS.

This Court has observed that "ERISA abounds with the language and terminology of trust law," *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), and has indicated that it will be "guided by principles of trust law" in determining the appropriate standard of review for the denial of a claim for benefits. *Id.* at 111. However, it is *not* true, as Petitioners contend, that, in recognizing its debt to trust law, "Congress intended ERISA to federalize the common law of trusts." (Cert. Pet. at 10; *see also* Pets' Br. at 29-30.) Congress drew upon the common law of trusts selectively, bearing in mind the differences between ERISA's regulatory scheme and the private non-statutory law of gratuitous transfers.

ERISA's "fiduciary responsibility section, in essence, codifies and makes applicable to [ERISA] *fiduciaries* certain principles developed in the evolution of the law of trusts." S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (emphasis added). Recognition of these principles, however, "does not support the broader proposition that ERISA meant to adopt the entire body of state trust law lock, stock and barrel." *Nieto*, 845 F.2d at 872 n.2. In fact, Congress noted that "[t]he principles of *fiduciary* conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651 (emphasis added).

Indeed, "application of traditional trust law principles may, in some instances, conflict with Congress' desire to eliminate barriers to the protection and enforcement of rights in ERISA-covered benefit plans." *Thornton v. Evans*, 692 F.2d 1064, 1079 (7th Cir. 1982). Congress was well aware of the inadequacies of existing trust law and thus chose *not* to incorporate inapposite features of that law into ERISA. *See* S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865.[26]

While Congress was influenced by existing trust law principles when it wrote ERISA, it modified certain of those principles (especially the fiduciary duty standards) to fit pension plans. Congress never intended the courts to employ

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[26] Courts which have opined that ERISA federalized the common law of trusts have done so based on the following statement by one of the Act's sponsors, Senator Williams:

> The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

120 Cong. Rec. 15737 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5186 (statement of Sen. Williams). Indeed, the first case to "federalize the common law of trusts," *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979), relied almost exclusively on this statement as the basis for its decision.

But even Senator Williams' statement shows that wholesale incorporation of trust law was not intended. Senator Williams' concern with prohibiting exculpatory clauses is instructive. ERISA unambiguously prohibits exculpatory clauses. *See* ERISA § 410(a), 29 U.S.C. § 1110(a) (1988). In stark contrast, at common law, exculpatory provisions in trust instruments were permitted and quite common. *See, e.g., In re E.F. Hutton Southwest Properties II, Ltd.*, 953 F.2d 963, 973 (5th Cir. 1992).

traditional trust law to create causes of action not found within ERISA's explicit terms. ERISA "embod[ies] a tailored law of trusts – a legal fabric which not only adopts familiar trust principles, but also supplements these principles with more exacting standards, *and* exempts from its reach certain parties and activities that may have been amenable to suit under traditional trust law." *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991) (emphasis in original). The legislative history's general references to trust law "provide[] no support for the incorporation of state law causes of actions as a supplement to the explicit provisions of ERISA." *Nieto*, 845 F.2d at 872.

The limited applicability of trust law to ERISA is illustrated by *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985), where this Court relied, in part, on common law trust principles in delineating "the general scope" of an ERISA trustee's "authority and responsibility." *Central States* did not use trust law in the manner proposed by Petitioners, i.e., to fashion an entirely new cause of action not set forth in the language of the Act. Instead, the Court applied those principles to "flesh out" the full meaning of specific rights and responsibilities enacted into law by Congress. Moreover, the Court noted that the structure of the Act itself supported its decision, *id.* at 571, and that there was no inconsistency between the Act and the trust law principles invoked by the Court. *Id.* at 568.

In contrast, to allow Petitioners to use the common law in the manner they propose would eviscerate the integrated and interrelated remedies carefully crafted by Congress "after 'almost a decade of studying the Nation's private pension plans' and other employee benefit plans." *Id.* at 569 (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)). *See generally* Comment, *Nieto v. Ecker*: The Propriety of Non-

Fiduciary Liability Under Section 409, 64 Notre Dame L. Rev. 271 (1989).[27]

C. FEDERAL COMMON LAW CANNOT BE USED TO CREATE CAUSES OF ACTION IN AN AREA WHERE CONGRESS HAS ALREADY SPOKEN.

Nor is Petitioners' argument strengthened by reference to the federal common law. (Pets' Br. at 19, 29-30.) "When Congress has not spoken to a particular issue, . . . the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law." *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (citation omitted). Federal common law, however, "is resorted to '[i]n absence of an applicable Act of Congress,' and because the Court is compelled to consider federal questions 'which cannot be answered from federal statutes alone.' " *Id.* at 314 (citations omitted).

This Court's precedents "do not suggest that, in the past, [it has] invoked some broad-ranging common-law source *for*

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[27] The proposition that Congress meant to federalize the common law of trusts begs the question of what exactly constitutes the *common* law of trusts. *See* 5A Austin W. Scott & William F. Fratcher, The Law of Trusts § 553, at 110 (4th ed. 1989) ("It is true that the law of trusts in all the states . . . is based upon the system originally developed by the English Court of Chancery. But not infrequently, . . . different rules have been developed in the various states as to certain problems, sometimes by judicial decision and more often by statute.").

In fact, significant differences appear to have existed at common law regarding the liability of a third party to a trust or its beneficiaries for participating in a breach of trust. As Professor Scott notes: "[I]n some states [the third party] is chargeable with notice of the breach of trust under circumstances in which he has not actual knowledge but has failed to make an inquiry that would have resulted in knowledge, whereas in other states he is not under these circumstances chargeable with notice." *Id.* § 623, at 391. Petitioners do not begin to suggest how this Court should resolve the differences in state trust law, because their analysis of the law of trusts extends no further than observing that, as a general proposition, courts of equity recognized a claim for knowing participation in a breach of fiduciary duty. (Pets' Br. at 20, 26-28.)

creating a cause of action." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645-46 (1981) (emphasis added). Yet, were the Court to adopt Petitioners' view, it would, in fact, be invoking a "broad ranging common-law source" to create a cause of action Congress has expressly declined to enact. Moreover, the Court would be creating this cause of action in an area – the liability of ERISA non-fiduciary service providers – where the Congress has already spoken extensively. "The establishment of . . . a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee*, 451 U.S. at 319.[28]

It is instructive that in the more than fifty times this Court has been called upon to interpret ERISA, it has only once invoked federal common law as the actual rule of decision. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Court relied on the federal common law in holding that courts must apply a *de novo* standard in reviewing the denial of a participant's benefit claim. Significantly, however, in stark contrast to the question presented here, ERISA is completely silent on the appropriate standard of review. This Court thus resorted to the federal common law in *Firestone* only because the issue raised had *not* been addressed by Congress. Here, the issue of non-fiduciary liability has been expressly addressed; Congress determined that plan participants can only obtain "appropriate equitable relief" from non-fiduciaries under ERISA.

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[28] *See also Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986) ("The claim that Congress intended for the federal courts to create a body of federal common law to govern ERISA cases does *not*, as appellant suggests, give a federal court *carte blanche authority to apply any prevailing state common law doctrine it chooses to ERISA cases*.") (emphasis added); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541 (7th Cir. 1991) (recognizing "distinction between the power of federal courts to create a substantive federal common law of contracts and trusts under ERISA and our *far more circumscribed power to augment ERISA's remedial provisions*.") (emphasis added).

Nevertheless, relying on *Firestone*, both Petitioners and the Solicitor General argue that they should prevail because the failure to recognize a money damages cause of action against non-fiduciaries would afford less protection to ERISA beneficiaries than they enjoyed before ERISA was enacted. (Pets' Br. at 26; SG Br. at 10, 16-17.) That assertion is incorrect. ERISA's complete system of protection for plan participants represents a vast enhancement of the protections formerly available to participants, including damages actions and equitable relief against fiduciaries and equitable and regulatory relief against non-fiduciaries. (*See supra* at 15-18.)

The fact that Congress purposely chose not to provide for a civil action seeking money damages from a non-fiduciary does not suggest that, under the reasoning of *Firestone* or otherwise, this Court may engraft that remedy onto the statute. *See Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453 (4th Cir. 1992) (Wilkinson, J., concurring) ("The device of federal common law does not authorize federal courts to smuggle state common law principles into ERISA without regard for the statutory text."); *Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2968 (1992) ("to devise a federal common law remedy for [plaintiff's] claim would defeat the scheme created by Congress in ERISA.").[29]

D. ERISA § 502(l) PROVIDES NO SUPPORT FOR PETITIONERS' CONTENTIONS.

Petitioners argue that Congress' decision to provide the Secretary of Labor with the power to fine non-fiduciaries for participating in a fiduciary breach confirms that Congress had already given participants the right to maintain an action against non-fiduciaries for money damages. (Pets' Br. at 15.)

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[29] *Cf. NLRB v. Hearst Publications*, 322 U.S. 111, 125 (1944) ("It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness.").

The difficulty with this argument is that Congress never indicated that it intended this expansive result. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (" 'The short answer is that Congress did not write the statute that way.' ") (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)). Indeed, in rejecting the "*Nieto*" amendment, Congress indicated that it intended for such a cause of action not to exist.

> Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.

INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp.*, 446 U.S. at 392-93 (Stewart J., dissenting)).[30]

ERISA § 502(l) allows the Secretary of Labor to impose a fine for any "knowing participation" in a breach of fiduciary duties by "other persons" in an amount equal to twenty percent of the "applicable recovery amount."[31] Petitioners' argument that there could never be an "applicable recovery amount" from "other persons" against which civil penalties

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[30] *See also Thompson v. Thompson*, 484 U.S. 174, 185 (1988) (finding it significant that "Congress considered and rejected an approach to the problem" similar to that of party urging implication of a private remedy); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 546 (1984) (noting that Congress "specifically considered" an issue in an early version of a bill but "deleted" it from the version finally passed); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 601 (1983) (failure of Congress to include proposal in statute " 'is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief.' ") (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 22 (1979)).

[31] "Applicable recovery amount" is defined as "any amount which is recovered from a fiduciary or other person with respect to a breach or violation" of ERISA Part 4, pursuant to a settlement agreement, or "ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5)." ERISA § 502(l)(2), 29 U.S.C. § 1132(l)(2) (Supp. II 1990).

could be measured unless ERISA encompassed the right to recover money damages from non-fiduciaries (Pets' Br. at 15) is premised on a misreading of the statute. In essence, what Petitioners ask this Court to do is to posit the existence of an entire cause of action on behalf of plan participants – indeed, one explicitly rejected by Congress – on the basis of one phrase – "applicable recovery amount" – in a section explicitly dealing with civil penalties available only to the Secretary of Labor.

Moreover, merely because the statute appears to contemplate that there might be occasions where there will be an "applicable recovery amount" from "other persons" against which to measure the Secretary's fine, does *not* mean that ERISA already authorizes participants (or the Secretary of Labor, for that matter) to maintain civil actions seeking the recovery of money damages from non-fiduciaries. There are several instances in which an "applicable recovery amount" from "other persons" violating ERISA would exist independent of a cause of action for money damages against non-fiduciaries.

ERISA § 502(l)(4), 29 U.S.C. § 502(l)(4) (Supp. II 1990), for example, instructs the Secretary to reduce the fine imposed under § 502(l) by the amount of any penalty imposed under ERISA § 502(i). ERISA § 502(i) is the provision allowing the Secretary of Labor to fine a party-in-interest participating in a prohibited transaction as defined in ERISA § 406. ERISA § 502(i) provides that the amount of the fine assessed for a violation of the prohibited transaction rules is to be a percentage of the "amount involved" as defined by § 4975(f)(4) of the Internal Revenue Code. Section 4975(f)(4) defines "amount involved" as "the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received" by the non-fiduciary party-in-interest as a result of the prohibited transaction. I.R.C. § 4975(f)(4).[32]

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[32] Congress plainly understood that there was substantial overlap between the new "knowing participation" penalty and the existing "party in

Thus, under § 502(i), there can be an "amount" by which to measure the Secretary's fine against a non-fiduciary service provider under § 502(l) without a money damages remedy. That "amount" is part of what § 502(l) was designed to address – violations of the prohibited transaction rules.[33]

Similarly, under § 502(a)(5) (which empowers the Secretary of Labor to seek "appropriate equitable relief" against persons violating ERISA), there may also be an "applicable recovery amount", even though no cognizable claim for money damages exists. As the Ninth Circuit observed, the phrase "other appropriate equitable relief" (which appears in both § 502(a)(3) and § 502(a)(5)) authorizes the awarding of equitable relief against *non-fiduciaries*, including those forms of equitable relief, like restitution, that involve the transfer of money. (J.A. 44.) The amount of money a non-fiduciary is required to disgorge by a restitution award under § 502(a)(5) would be the "applicable recovery amount."[34]

The fact that § 502(l) does not provide plan participants, directly or by implication, with the right to maintain a civil

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interest" penalty. *See* David L. Bacon et al., Employee Benefits Guide § 7.13[1], at 7-71 (1992) (noting that § 502(l) meant to address, *inter alia*, violations of the prohibited transactions rules). This is further evidenced by the fact that, upon § 502(l)'s amendment, § 502(a)(6), 29 U.S.C. § 1132(a)(6) (Supp. II 1990), was amended to permit the Secretary of Labor to maintain a civil action to collect any civil penalty under § 502(i) *and* § 502(l).

[33] The Department of Labor's comments on § 502(l)'s proposed regulations reflect that the amount "necessary to achieve correction" of a prohibited transaction will constitute an "applicable recovery amount" for purposes of § 502(l). 55 Fed. Reg. 25,288 (to be codified at 29 C.F.R. pt. 2560) (proposed June 20, 1990).

[34] Conversely, the Department of Labor's comments on § 502(l)'s proposed regulations demonstrate that, if "the equitable relief awarded does *not* involve the transfer to the plan of money or property, *no civil penalty may be assessed pursuant to section 502(l).*" 55 Fed. Reg. 25,288, 25,289 n.9 (to be codified at 29 C.F.R. pt. 2560) (proposed June 20, 1990) (emphasis added).

action seeking money damages from non-fiduciaries, is also confirmed by the legislative history.

The initial OBRA bill – proposed by the House of Representatives – included an ERISA amendment entitled: "Clarification of liability of knowing participants in breaches of fiduciary duty." H.R. Rep. No. 247, 101st Cong., 1st Sess., *reprinted in* 1989 U.S.C.C.A.N. 1906, 1969. If enacted, it would have made persons who knowingly participate in a breach of fiduciary duty liable for money damages. However, when that bill was submitted to the Senate, it was *rejected* in its entirety in favor of a proposed Senate bill. *See* H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess., *reprinted in* 1989 U.S.C.C.A.N. 3018. In response, the House submitted a third version. *Id.* The House and Senate conferees then agreed on the final language of the bill. The House's "*Nieto*" amendment did not make it into the final bill.

Section 502(l)'s adoption had *nothing to do* with overruling *Nieto* or providing participants with the right to maintain an action seeking money damages from non-fiduciaries. While noting the importance of trust law principles to ERISA, the legislative history demonstrates that § 502(l) served solely as a compromise response to the Senate's attempt, in its version of the bill, *to increase the insurance premiums paid by plans for PBGC insurance*.

The initial proposed Senate bill would have increased PBGC insurance premiums paid by all covered single-employer plans. The House bill contained no such provision. The Conference Committee compromised on § 502(l):

> *In lieu of the premium increase, the conferees agreed to strengthen the Secretary of Labor's authority to enforce ERISA by providing for a mandatory civil penalty for certain violations.*

Id. at 3034 (emphasis added).

Accordingly, instead of supporting the contention that the amendment created or confirmed a plan participant's right to seek money damages from non-fiduciaries, the legislative history reinforces the conclusion that ERISA contains no such provision and highlights Congress' intention not to create such a cause of action.

In short, in relying on § 502(l), Petitioners are engaged in interpretive shadow boxing – arguing that a cause of action exists whose only statutory "basis" is the shadow cast by Congress' enactment of an entirely different civil penalty provision only enforceable by the Secretary of Labor. In the face of the direct evidence to the contrary, this Court should not create a cause of action based on that ephemeral foundation.[35]

E. *RUSSELL'S* PRONOUNCEMENT THAT CAUSES OF ACTION NOT INCORPORATED IN ERISA SHOULD NOT BE IMPLIED IS STILL CONTROLLING.

In *Russell*, 473 U.S. at 148, this Court held, after thoroughly analyzing ERISA's text, structure and legislative history, that ERISA did not provide a plan participant with "a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims."

Petitioners erroneously suggest that *Russell* now has been overruled by *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). (Pets' Br. at 22.) In that case, McClendon claimed that Ingersoll-Rand had fired him in order "to avoid making contributions to his pension fund." 111 S. Ct. at 481. McClendon sued in Texas state court under various tort and contract theories, seeking compensatory and punitive damages. *Id.* Because the action did not seek "pension benefits", the state court found that it was not preempted by ERISA. However, this Court held McClendon's state law claims preempted,

[35] *See Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 421 (1975) (refusing to infer a private right of action to enforce the Securities Investor Protection Act because there was no indication "that Congress ever contemplated a private right of action parallel to that expressly given to the SEC."); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 457 (1974) (refusing to infer private right of action under § 307(a) of the Rail Passenger Service Act of 1970 because the relevant language of that provision was expressly limited to actions brought by the Attorney General).

since they "related to" an employee benefit plan. ERISA § 510, 29 U.S.C. § 1140 (1988), made it unlawful for any person to discharge a participant for exercising any right under the provisions of any employee benefit plan, and made the enforcement provisions of ERISA § 502, 29 U.S.C. § 1132 (1988 & Supp. II 1990), expressly applicable to the enforcement of the rights created by § 510. In reaching that result, this Court stated:

> [T]here is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a preemption argument that a particular plaintiff is not seeking recovery of pension benefits.

Id. at 486.

The vast majority of courts that have been faced with the issue have rejected Petitioners' argument that *Russell's* admonition against implying causes of action Congress chose not to incorporate in ERISA has somehow been overruled by this passage. *See, e.g.*, *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 n.7 (11th Cir. 1991) ("The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits. . . . The Supreme Court is not holding that the specific *remedies* . . . sought under state law are necessarily the remedies that will be afforded him . . . under ERISA § 502.") (emphasis in original).[36]

[36] *Accord Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992). *See also Roberts v. Thorn Apple Valley, Inc.*, 784 F. Supp. 1538, 1541 (D. Utah 1992) ("The Court agrees with the observation made by several other courts, that the Supreme Court would not overrule a considerable body of federal caselaw barring punitive and extra contractual damages under ERISA without a specific expression of such intent."); *Gaskell v. Harvard Coop. Soc'y*, 762 F. Supp. 1539, 1544 (D. Mass. 1991) ("[H]ad the Supreme Court intended to expand the realm of potential relief available under ERISA, . . . it would have done so explicitly. Such a departure from precedent likely would not have been

In any event, the relief available to a plan participant under § 502(a) for enforcing rights expressly created by a specific ERISA provision, is a much different question from whether this Court can incorporate a specific cause of action against non-fiduciaries that Congress expressly declined to enact. *Russell's* prohibition against judicial tampering with ERISA's enforcement scheme remains controlling.

F. PETITIONERS ARE NOT ENTITLED TO "APPROPRIATE EQUITABLE RELIEF" UNDER ERISA § 502(a)(3).

Whatever claim for "appropriate equitable relief" Petitioners might once have had under § 502(a)(3) has been abandoned. Although Petitioners' Complaint merely sought an order that Hewitt "make good to the Plan, plaintiffs and their class any and all losses to the Plan resulting from [Hewitt's] breaches of ERISA," together with a claim for punitive damages (J.A. 15), the District Court, at Petitioners' request, agreed to construe the Complaint as including a prayer for restitutionary relief. (J.A. 26.) Having done so, however, the District Court then found that Petitioners had failed to state a claim for equitable restitution as a matter of law. (J.A. 26-28.)

The Ninth Circuit agreed, holding that Petitioners had not stated a viable equitable restitution claim because they had not alleged that Hewitt received anything other than its compensation for actuarial services. (J.A. 44.) Thus, "[r]estitution was not available because unjust enrichment to support plaintiffs' claim was not alleged." (*Id.*) The Ninth Circuit also found that it was "not possible . . . to frame a claim for

accomplished in a single sentence, in dicta, at the close of an opinion focused exclusively on a wholly different issue."); *Monfiletto v. John Hancock Healthplans, Inc.*, Civ. No. 90-5137, 1991 WL 231608, at *2, 1991 U.S. Dist. LEXIS 15875 at *5-6 (E.D. Pa. Oct. 30, 1991); *O'Neil v. GenCorp, Inc.*, 764 F. Supp. 833, 834 (S.D.N.Y. 1991) ("Had Justice O'Connor intended . . . that [her] analysis of § 510 was overruling the considerable amount of federal caselaw barring punitive and extra-contractual damages under ERISA . . . she would undoubtedly have so stated.")

restitution . . . of plan assets wrongfully obtained by Hewitt" because Hewitt was paid by Kaiser, not out of assets of the Plan. (J.A. 45.) Finally, the Ninth Circuit rejected Petitioners' claim that all payments received by Hewitt from Kaiser were unjust enrichment in "remuneration for breach of Hewitt's statutory duty" because such a finding would gut the already "blurry distinction" between restitution and damages at law. (*Id.*)

Petitioners have not sought review of that portion of the Ninth Circuit's ruling. Accordingly, review is barred by Supreme Court Rule 14.1(a). *See, e.g., Regents of Univ. of California v. Bakke*, 438 U.S. 265, 280 & n.13 (1978) (where petitioner had not challenged lower court's decision regarding shifting of burden of proof, Court declined to address the issue, stating "[t]he issue of the proper placement of the burden of proof . . . is not before us."); *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984) ("we are chary of considering issues not presented in petitions for certiorari.").

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988), provides:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its asserts, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

ERISA § 409(a), 29 U.S.C. § 1109(a) (1988), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

ERISA § 502(a), 29 U.S.C. § 1132(a) (1988 & Supp. II 1990), provides in relevant part:

A civil action may be brought –

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

ERISA § 502(l), 29 U.S.C. § 1132(l) (Supp. II 1990), provides:

(1) In the case of – (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) – (A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding

instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that – (A) the fiduciary or other person acted reasonably and in good faith, or (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 3042, 29 U.S.C. § 1242 (1988), provides:

Enrollment by Board; Standards and qualifications; suspension or termination of enrollment

(a) The Joint Board shall, by regulations, establish reasonable standards and qualifications for persons performing actuarial services with respect to plans in which this chapter applies and, upon application by any individual, shall enroll such individual if the Joint Board finds that such individual satisfies such standards and qualifications. With respect to individuals applying for enrollment before January 1, 1976, such standards and qualifications shall include a requirement for an appropriate period of responsible actuarial experience relating to pension plans. With respect to individuals applying for enrollment on or after January 1,

1976, such standards and qualifications shall include –

(1) education and training in actuarial mathematics and methodology, as evidenced by –

(A) a degree in actuarial mathematics or its equivalent from an accredited college or university,

(B) successful completion of an examination in actuarial mathematics and methodology to be given by the Joint Board, or

(C) successful completion of other actuarial examinations deemed adequate by the Joint Board, and

(2) an appropriate period of responsible actuarial experience.

* * *

(b) The Joint Board may, after notice and an opportunity for a hearing, suspend or terminate the enrollment of an individual under this section if the Joint Board finds that such individual –

(1) has failed to discharge his duties under this chapter, or

(2) does not satisfy the requirements for enrollment as in effect at the time of his enrollment.

The Joint Board may also, after notice and opportunity for hearing, suspend or terminate the temporary enrollment of an individual who fails to discharge his duties under this Act or who does not satisfy the interim enrollment standards.

20 C.F.R. § 901.20 (1992) provides:

STANDARDS OF PERFORMANCE OF ACTUARIAL SERVICES

In the discharge of duties required by ERISA of enrolled actuaries with respect to any plan to which the Act applies:

(a) *In general.* An enrolled actuary shall undertake an actuarial assignment only when qualified to do so.

(b) *Professional duty.* An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.

(c) *Advice or explanations.* An enrolled actuary shall provide to the plan administrator upon appropriate request, supplemental advice or explanation relative to any report signed or certified by such enrolled actuary.

(d) *Conflicts of interest.* In any situation in which the enrolled actuary has a conflict of interest with respect to the performance of actuarial services, of which the enrolled actuary has knowledge, he/she shall not perform such actuarial services except after full disclosure has been made to the plan trustees, any named fiduciary of the plan, the plan administrator, and, if the plan is subject to a collective bargaining agreement, the collective bargaining representative.

(e) *Assumptions, calculations and recommendations.* The enrolled actuary shall exercise

due care, skill, prudence and diligence to ensure that:

(1) The actuarial assumptions are reasonable in the aggregate, and the actuarial cost method and the actuarial method of valuation of assets are appropriate,

(2) The calculations are accurately carried out, and

(3) The report, any recommendations to the plan administrator and any supplemental advice or explanation relative to the report reflect the results of the calculations.

(f) *Report or certificate.* An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed.

(g) *Utilization of enrolled actuary designation.* An enrolled actuary shall not advertise his/her status as an enrolled actuary in any solicitation related to the performance of actuarial services, and shall not employ, accept employment in partnership, corporate, or any other form, or share fees with, any individual or entity who so solicits. However, the use of the term "enrolled actuary" to identify an individual who is named on the stationery, letterhead or business card of an enrolled actuary, or of a partnership, association, or corporation shall not be considered in violation of this section. In addition, the term "enrolled actuary" may appear after the general listing of an enrolled

actuary's name in a telephone directory provided such listing is not of a distinctive nature.

(h) *Notification.* An enrolled actuary shall provide written notification of the non-filing of any actuarial document he/she has signed upon discovery of the non-filing. Such notification shall be made to the office of the Internal Revenue Service, the Department of Labor, or the Pension Benefit Guaranty Corporation where such document should have been filed.

20 C.F.R. § 901.31 (1992) provides:

GROUNDS FOR SUSPENSION OR TERMINATION OF ENROLLMENT

(a) *Failure to satisfy requirements for enrollment.* The enrollment of an actuary may be terminated if it is found that the actuary did not satisfy the eligibility requirements set forth in §§ 901.12 or 901.13, whichever is applicable.

(b) *Failure to discharge duties.* The enrollment of an actuary may be suspended or terminated if it is found that the actuary, following enrollment, failed to discharge his/her duties under ERISA. Such duties include those set forth in § 901.20.

(c) *Disreputable conduct.* The enrollment of an actuary may be suspended or terminated if it is found that the actuary has, at any time after he/she applied for enrollment, engaged in any conduct set forth in § 901.13(e)(1)(i)-(vi) or other conduct evidencing fraud, dishonesty, or breach of trust. Such other conduct includes, but is not limited to, the following:

(1) Conviction of any criminal offense under the laws of the United States (including Section 411 of ERISA, 29 U.S.C. 1111), any State thereof, the District of Columbia, or any territory or possession of the United States, which evidences fraud, dishonesty, or breach of trust.

(2) Knowingly filing false or altered documents, affidavits, financial statements or other papers on matter relating to employee benefit plans or actuarial services.

(3) Knowingly making false or misleading representations, either orally or in writing, on matters relating to employee benefit plans or actuarial services, or knowingly failing to disclose information relative to such matters.

(4) The use of false or misleading representations with intent to deceive a client or prospective client, or of intimations that the actuary is able to obtain special consideration or action from an officer or employee of any agency or court authorized to determine the validity of pension plans under ERISA.

(5) Willful violation of any of the regulations contained in this part.

INTERNAL REVENUE CODE § 4975(f)(4), 26 U.S.C. § 4975(f)(4) (1988), provides:

Amount involved

The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of

subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value –

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

INTERNAL REVENUE CODE § 6059, 26 U.S.C. § 6059 (1988), provides:

(a) GENERAL RULE – The actuarial report described in subsection (b) shall be filed by the plan administrator (as defined in section 414(g)) of each defined benefit plan to which section 412 applies, for the first plan year for which section 412 applies to the plan and for each third plan year thereafter (or more frequently if the Secretary determines that more frequent reports are necessary).

(b) ACTUARIAL REPORT – The actuarial report of a plan required by subsection (a) shall be prepared and signed by an enrolled actuary (within the meaning of section 7701(a)(35)) and shall contain –

(1) a description of the funding method and actuarial assumptions used to determine costs under the plan,

(2) a certification of the contribution necessary to reduce the accumulated funding deficiency (as defined in section 412(a)) to zero,

(3) A statement –

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 412(c) (relating to reasonable actuarial assumptions) have been complied with,

(4) such other information as may be necessary to fully and fairly disclose the actuarial position of the plan, and

(5) such other information regarding the plan as the Secretary may by regulations require.

INTERNAL REVENUE CODE § 7701(a), 26 U.S.C. § 7701(a) (1988), provides:

(35) Enrolled actuary

The term "enrolled actuary" means a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the title III of the Employee Retirement Income Security Act of 1974.

No. 91-1671

In The

Supreme Court of the United States

October Term, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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I. CONGRESS' 1989 AMENDMENT OF ERISA, WHICH REQUIRES THE SECRETARY OF LABOR TO ASSESS CIVIL PENALTIES AGAINST PERSONS WHO KNOWINGLY PARTICIPATE IN FIDUCIARY BREACHES, APPLIES BROADLY TO "ANY PERSON" WHO KNOWINGLY PARTICIPATES IN A BREACH OF FIDUCIARY DUTY.

In their main brief, Petitioners discussed Congress' 1989 amendment to ERISA, Section 502(*l*), 29 U.S.C. § 1132(*l*), which requires the Secretary of Labor to assess civil penalties against any person who knowingly participates in a breach of fiduciary duty in an amount equal to twenty percent of "the applicable recovery amount." The term "applicable recovery amount" is defined in section 502(*l*)(2) as any amount which is recovered from a fiduciary or "any other person" who participates in a fiduciary breach in an action by the Secretary under Section 502(a)(5), 29 U.S.C. § 1132(a)(5). Petitioners then argued that since Section 502(a)(5) (which allows the Secretary to sue for equitable relief) has wording identical to that in Section 502(a)(3) (which allows participants to sue for equitable relief), the amendment makes clear that Section 502(a)(3) must have encompassed monetary relief against non-fiduciary aiders and abettors all along. (Pet. Br. 13-18).

Respondent Hewitt Associates ("Hewitt") and certain of the *amici* contend that the term "applicable recovery amount" can be explained as limited to an amount recovered from co-fiduciaries or parties in interest by the Secretary under Section 1132(a)(5); thus, that section does not necessarily encompass an action against knowing participants in fiduciary breaches. Hewitt also argues that

the penalty imposed by 502(*l*) was merely a revenue enhancing measure. They cite certain proposed Department of Labor regulations which allegedly show that 502(*l*)'s scope is limited. (Hewitt Br. 37-41).

Section 502(*l*) is not limited, as Hewitt contends, to co-fiduciaries and parties in interest. Section 502(*l*)(1) does not refer to fiduciaries (liable under sections 502(a)(2), 409 and 404), co-fiduciaries (liable under sections 502(a)(2), and 405), parties in interest (liable under sections 406 and 502(i)), disqualified persons (liable under 26 U.S.C. 4975), or to parties otherwise regulated or not regulated by ERISA. Instead, the statute imposes liability on "*any other person*" who knowingly participates in a breach of fiduciary duty. *See United States v. Gaggi*, 811 F.2d 47, 56 (2nd Cir. 1987) ("We presume that the use of different terminology within a body of legislation evidences a congressional purpose to differentiate."); *Beef Nebraska, Inc. v. United States*, 807 F.2d 712, 717 (8th Cir. 1986). Therefore, all persons who knowingly participate in breaches of fiduciary duty may be held liable under 502(*l*), not just those who are also liable under ERISA as fiduciaries, co-fiduciaries, parties in interest, or disqualified persons.

Congress did not enact section 502(*l*), as Hewitt contends, simply as a revenue enhancing measure. Congress enacted section 502(*l*) to strengthen enforcement of ERISA. Congress thought that the mandatory imposition of a civil penalty would deter potential breaches of fiduciary duty by fiduciaries and those who assist them in such breaches. Congress also sought to encourage the

courts to use section 502(*l*) to enforce the rights of plan participants. The Conference Report on OBRA states:

> The conferees further believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans. It remains the intent of Congress that the courts use their powers of [sic] fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well.

H.R. Rep. No. 101-386, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. and Admin. News 3018, 3035-3036. *See also* 165 Cong. Rec. H9603 (daily ed. November 21, 1989) (statement of Rep. Clay on enactment of ERISA § 502(*l*)).[1]

The enactment of section 502(*l*) is highly relevant to whether Congress has always intended knowing participants to be liable for all losses to plans. Subsequent legislative amendments are valuable guides for ascertaining the original intent of Congress in enacting legislation. *See Two Pesos, Inc. v. Taco Cabana Int'l. Inc.*, 112 S.Ct. 2753, 2765, n. 17, *reh'g denied*, 113 S.Ct. 2753 (1992) (Stevens, J., concurring) ("When several acts of Congress are passed

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[1] *See also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 157 (1985) (Brennan, J. concurring) ("ERISA was not so 'carefully integrated' and 'crafted' as to preclude further delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that the courts shall undertake it.")

touching on the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight . . . "); *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 380-81 (1969) ("subsequent legislation declaring the intent of an earlier Congress is entitled to great weight in statutory construction."). *See generally*, N. Singer, 2A Sutherland Statutory Construction § 49.11 (rev. 4th ed. 1984).

The term "applicable recovery amount" as defined in section 502(*l*)(2) cannot, as Hewitt contends, include "all losses" when applied to fiduciaries, but only restitution when applied to knowing participants. Such a construction would force the Court to give the phrase "applicable recovery amount" different meanings when applied to different persons. This is contrary to the principle of statutory construction that a word used in a statute be given a consistent meaning. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2596 (1992). In addition, by adopting such a strained construction the Court would be rewriting section 502(*l*)(3) to read that the Secretary may consider the ability of a knowing participant "to make restitution." As adopted by Congress, the statute refers to the ability of a knowing participant "to restore all losses to the plan." Section 502(*l*)(3), 29 U.S.C. § 1132(*l*)(3).

The proposed Department of Labor regulations Hewitt cites support Petitioners' argument that the term "applicable recovery amount" in 502(*l*) encompasses actions under 502 against any person who knowingly

participates in a breach of fiduciary duty. The proposed regulations state that the Department of Labor "generally defines the term 'applicable recovery amount' to mean any amount which is recovered on behalf of an employee benefit plan or any participant or beneficiary of such a plan [from a fiduciary for breach of fiduciary duty] . . . *or from a person who knowingly participated in such a breach or violation.*" The proposed regulations further state that the applicable recovery amount "paid by such a breaching fiduciary *or knowing participant* will include amounts paid to the plan by such person *which represent losses suffered by the plan. . . .* " 55 Fed. Reg. 25,288; (emphasis added).

The Secretary of Labor's consistent and long-standing position is that ERISA provides a right of action for monetary relief against persons who knowingly participate in a breach of fiduciary duty. As a plaintiff in *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979), the Secretary of Labor successfully argued that knowing participants in fiduciary breaches may be held liable under ERISA in the first and seminal decision so holding. The Department of Labor has strictly adhered to that position for thirteen years.

Clearly, the Department's interpretation is a "permissible construction of the statute." It should be afforded great weight. *Pension Ben. Guar. Corp. v. LTV Corp.* 110 S.Ct. 2668, 2676 (1990) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). *See also Amer. Paper Inst. v. Amer. Elec. Pow. Serv. Corp.*, 461 U.S. 402, 422 (1983). Thus, rather than attempting to read unwarranted implications into the Department of Labor's proposed regulation, the Court should defer to the Department's longstanding

position that persons who knowingly participate in breaches of fiduciary duty may be held liable for all plan losses.

Hewitt gives great significance to the fact that Congress did not explicitly overrule *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988). (Hewitt Br. 23.) Petitioners have shown that this argument is unpersuasive. (Pet. Br., 17.) Rather than focusing, as Hewitt would, on what Congress did not enact, the Court should give effect to the legislation that Congress *did* enact. To give effect to section 502(*l*), an underlying cause of action against knowing participants for breaches of fiduciary duty must necessarily exist in sections 502(a)(3) and (a)(5). ERISA, including section 502(*l*), "must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992). Section 502(*l*) must be read in light of the rest of the statute and the rest of the statute must be read in light of section 502(*l*). *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961).

II. "APPROPRIATE EQUITABLE RELIEF" INCLUDES RESTORING ALL LOSSES TO A PLAN RESULTING FROM A FIDUCIARY BREACH.

Hewitt argues that the term "equitable relief" in section 502(a)(3) and (5), 29 U.S.C. § 1132(a)(3) and (5), does not include the remedy of restoring all losses to a plan resulting from a fiduciary breach, because such a remedy is "legal" and not "equitable." (Hewitt Br. 25-32). This construction of section 502(a)(3) is erroneous. The statute's wording and structure make it clear that Congress

considered the remedy of restoring all losses to a plan caused by a fiduciary breach, or a knowing participation in such breach, a form of equitable relief.

The broad and open-ended wording of section 502(a)(3) itself supports a liberal construction rather than the cramped one asserted by Hewitt. In reading section 502(a)(3), the Sixth Circuit said:

> [t]he term "other appropriate equitable relief" implies a broad range of remedies. We adhere to the principle, "endorsed repeatedly by the federal judiciary" that "when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important Congressional goals."

Warren v. Society Nat. Bank, 905 F.2d 975, 982 (6th Cir. 1990) (quoting in part from *Cia Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 428 (1st Cir. 1985)). Section 503(a)(3)'s broad provision for "appropriate equitable relief" to "redress" violations of the statute is a mandate to the courts to fashion all remedies which are appropriate to enforce the Act. Respondent gives no persuasive reason why this language should not be construed to include make-whole relief against those who knowingly aid fiduciaries in carrying out violations of ERISA.

Hewitt relies heavily on this Court's decision in *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 110 S.Ct. 1339 (1990). In *Terry*, the Court held that a damage claim for breach of the duty of fair representation and breach of contract was more like a traditional "legal" than

an "equitable" claim for purposes of the Seventh Amendment right to jury trial. *Terry's* Seventh Amendment analysis, however, is inapposite in determining how *Congress* may have used the term "equitable relief" in a specific statute. This Court has emphasized that ERISA "abounds with the language and terminology of trust law," and that ERISA's legislative history confirms that Congress made applicable to ERISA principles developed in the law of trusts. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). In using the term "equitable relief" in ERISA, it is likely that Congress had in mind its settled meaning in trust law. As *Terry* makes clear, damages for breach of trust have always been considered equitable relief in trust law. *Terry*, 110 S.Ct. at 1348 n.8. *See also, United States v. Mitchell*, 463 U.S. 206, 226-227 (1983); G. Bogert & G. Bogert, Law Of Trusts and Trustees, § 862 (2nd Ed. 1982), p. 27; Restatement (Second) of Trusts, §§ 205-212 (1959).[2]

The relevant inquiry is what Congress intended by the term "equitable relief" in the specific context of ERISA. Indeed, *Terry* distinguishes cases holding that monetary claims for back pay under Title VII of the Civil Rights Act of 1964 are "equitable", noting that "Congress specifically characterized back pay under Title VII as a

[2] *See also Warren v. Society Nat. Bank, supra*, 905 F.2d at 982: "[Under] the law of trusts, a beneficiary is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages." (citing *Russell*, 473 U.S. at 154, n. 10, Brennan, J. concurring) ". . . Our position is supported by decisions of other courts of appeals finding that equitable relief includes monetary damages where required to afford complete relief." *Id.*

form of 'equitable relief'." The *Terry* Court quotes the specific language of Title VII's remedial provision, which provides for reinstatement of employees with or without back pay or for *"any other equitable relief* as the court deems appropriate." 110 S.Ct. 1348-1349. (quoting 42 U.S.C. § 200e-5(g)) (emphasis added).

Section 409(a) of ERISA uses virtually the same wording as the remedial language of Title VII quoted in *Terry*. Section 409(a), 29 U.S.C. 1109(a), provides that a fiduciary who commits a fiduciary breach shall be liable "to make good to such plan" "any losses" to the plan resulting from each breach and

> shall be subject to such *other equitable* or remedial relief as the court may deem appropriate. . . . ERISA § 409(a), 29 U.S.C. § 1109(a) (emphasis added).

Congress' reference in section 409 to "other equitable relief" shows that Congress deemed restoration of losses to a plan to be a form of "equitable relief." Construing "appropriate equitable relief" under section 502(a)(3) to include restoration of "all losses to the plan" is consistent with judicial interpretations of section 409(a) that hold that claims for losses to a plan are equitable claims for jury trial purposes. See *Diduck v. Koszycki & Sons Contractors, Inc.*, 12 E.B.C. 1762, 1781 (S.D.N.Y. 1990) ("the nature of the relief afforded pursuant to section 409 is equitable and not legal"); *Kahnke v. Herter*, 579 F. Supp. 1523, 1526-28 (D. Minn. 1984) (Section 409 provides essentially equitable relief). If restoration of losses to a plan under section 409 is equitable relief, then restoration of losses to a plan under section 502(a)(3) is also "equitable relief."

Finally, as petitioners have already argued (Pet. Br. 18), Congress' provision for a "waiver" of the civil penalty imposed by section 502(*l*) shows that the phrase "appropriate equitable relief" in sections 502(a)(3) and (5) includes the remedy of the restoration of "all losses to the plan." Under section 1132(*l*)(3)(B), the Secretary may waive or reduce the civil penalty imposed by section 502(*l*) if imposition of the penalty would interfere with the non-fiduciary's ability "to restore all losses to the plan without severe financial hardship." This waiver criterion would be meaningless if the non-fiduciary were not liable, in the first instance, for "all losses to the plan."

III. CONGRESS DID NOT INTEND THAT NON-FIDUCIARIES WHO KNOWINGLY PARTICIPATE IN FIDUCIARY BREACHES SHOULD LEAD A CHARMED LEGAL EXISTENCE FREE OF ALL LIABILITY, STATE OR FEDERAL.

Hewitt and its supporting *amici* cite the description of ERISA in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1984), as a "comprehensive and reticulated" statute in support of their argument that ERISA does not authorize claims against non-fiduciaries who knowingly participate in fiduciary breaches. (Hewitt Br. 12-13.) However, as the Second Circuit recently stated in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 280 (2nd Cir. 1992):

> *Russell*'s statements regarding the limited authority to fashion remedies is taken out of context. Giving the Supreme Court's limiting language broad application would defeat Congress' effort to shape relief based on trust law principles where appropriate. [Citations omitted]

Diduck notes that principles of trust law are appropriately considered in construing ERISA's remedial provisions where they are consistent with the legislative scheme and further the remedial objectives of the statute. Unlike the situation in *Russell*, petitioners here seek relief that is plainly consistent with ERISA's scheme and which furthers ERISA's important purposes.

The Second Circuit in *Diduck* found that a right of action against non-fiduciaries furthered two major ERISA goals: the uniform development of law in the area of employee benefit plans (*Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)) and the compelling federal interest in ensuring that employee benefit plan participants obtain the benefits that they are promised. (*H.R.Conf.Rep. No. 386, 101st Cong., lst Sess. 432-33, reprinted in 1989 U.S. Code Cong. and Admin. News 3018, 3035-36.*)

The court thought it extremely improbable that Congress meant to preclude any remedy, either under ERISA or under state law, against those who knowingly participate in fiduciary breaches. The court reasoned that if ERISA preempts state law claims for aiding and abetting fiduciary breaches, and at the same time provides no remedy, then "[t]he compelling federal interest in ensuring that employee benefit plan participants and beneficiaries obtain the benefits to which they are entitled will be thwarted. . . . " *Diduck*, 974 F.2d at 281. In such a scenario, non-fiduciary aiders and abettors "will be permitted a charmed existence that never was contemplated by Congress." *Rebaldo v. Cuomo*, 749 F.2d 133, 139 (2nd Cir. 1984).

In essence, Hewitt argues for just such a charmed existence.

On the other hand, if ERISA does not preempt state law claims against non-fiduciaries for aiding and abetting fiduciary breaches, then the Congressional goal of uniformity of application of ERISA would be thwarted: the fiduciary would be subject to liability under federal law and the non-fiduciary knowing participant would be liable under varying standards of state law. *Diduck*, 974 F.2d at 281.

Nevertheless, Hewitt argues that a claim against non-fiduciaries who knowingly participate in fiduciary breaches is inconsistent with ERISA's scheme, which is based, according to Hewitt, on the distinction between fiduciaries and non-fiduciaries. (Hewitt Br. 13-19.)

Hewitt's argument begs the question. Petitioners do not dispute that ERISA's fiduciary responsibility provisions represent the core of the Act's remedial scheme. Nor do petitioners dispute that by enacting ERISA's fiduciary responsibility provisions Congress sought primarily to protect plan assets against misconduct and to ensure that participants received their promised retirement benefits. To effectuate these Congressional goals, however, participants must have a cause of action against non-fiduciary aiders and abettors. Indeed, the Conference Report on the 1989 OBRA Amendment that added section 502(*l*)(1) says as much:

> It *remains* the intent of Congress that the courts use their power [to] fashion legal and equitable remedies that not only protect participants and

> beneficiaries but *deter* violations of the law as well.

H.R.Conf.Rep. No. 386, 101st Cong., 1st Sess. 433, *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 3018, 3036 (emphasis added). The fact that ERISA distinguishes between fiduciaries and non-fiduciaries does not insulate from liability a non-fiduciary who knowingly participates in a breach of fiduciary duty.

Hewitt and certain *amici* contend that ERISA provides petitioners with sufficient remedies against non-fiduciaries who engage in misconduct. (Hewitt's Br. 15-18.) The Act itself, however, rebuts this contention.

The Joint Board of Actuaries, to which Hewitt points, has the power only to suspend or terminate the enrollment of an actuary for failure to discharge his or her duties. ERISA § 3042(b), 29 U.S.C. § 1242(b). This sanction provides no redress to *petitioners* for their lost retirement benefits.[3] Nor does it provide a remedy for the severe underfunding of the Kaiser Steel Retirement Plan, which required the PBGC to assume responsibility for substantial financial liabilities. Concerning the "other" ERISA remedies which Hewitt alleges, in this case the district court held that Hewitt could not be sued as an ERISA fiduciary and that ERISA provides no remedy for Hewitt's alleged breach of professional actuarial duties. (J.A. 22-25, 26-28.) The Court of Appeals affirmed. (J.A.

[3] Petitioner Mertens suffered a reduction in his monthly pension from $2,016.00 to $521.00, petitioner Bandrowski from $1,907.00 to $670.00, petitioner Clarke from $2,567.00 to $1,103.00, and petitioner Franz from $1,426.00 to $478.00. (J.A. 6-7).

38) Under ERISA, petitioners' only remedy against Hewitt is the remedy they now seek in this Court.

Contrary to Hewitt's argument, ERISA's entire remedial scheme demonstrates that Congress considered private enforcement by plan participants vital to ERISA's effective enforcement. ERISA grants participants extensive enforcement authority virtually identical to that of the Secretary of Labor. Indeed, in enacting section 502(*l*) in 1989, Congress emphasized the need for strengthened enforcement and deterrence of ERISA violations, and that that need "applies not only to the Department of Labor, but to judicial oversight of *private rights of action* affecting employee benefit plans." *H.R. Rep. No. 101-386, 101st Cong., 1st Sess., reprinted in 1989 U.S. Code Cong. and Admin. News 3018, 3035-36;* emphasis added.

IV. CONCLUSION.

Congress' 1989 amendment of ERISA, which requires the Secretary of Labor to assess civil penalties against non-fiduciaries who knowingly participate in a breach of fiduciary duty, confirms Congress' original intent to impose liability on aiders and abettors of fiduciary breaches. A cause of action under ERISA against non-fiduciaries who knowingly participate in fiduciary breaches is essential to deter violations of ERISA's fiduciary responsibility provisions, and to ensure that plans can

recover losses caused by such violations. Petitioners respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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No. 91-1671

In the Supreme Court of the United States

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William J. Mertens, et al., petitioners

v.

Hewitt Associates

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a nonfiduciary who knowingly participates in a breach of a fiduciary duty imposed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, is liable for losses that an employee benefit plan sustains as a result of the breach.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1671

WILLIAM J. MERTENS, ET AL., PETITIONERS

v.

HEWITT ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether courts may enforce the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, against a nonfiduciary who knowingly participates in a violation of ERISA's fiduciary duties. The Secretary of Labor has primary enforcement authority for the fiduciary provisions of Title I of ERISA and has filed numerous ERISA actions seeking to impose liability on nonfiduciaries for participation in breaches of fiduciary duties imposed by ERISA. See, *e.g.*, *Whitfield* v. *Lindemann*, 853 F.2d 1298 (5th Cir. 1988), cert. denied *sub nom. Klepak* v. *Dole*, 490 U.S. 1089 (1989). As we explained in our brief filed at the petition stage at the Court's

invitation, the court of appeals' ruling unduly restricts ERISA's enforcement provisions. Because the Court's disposition of the case is likely to have a significant effect on the enforcement of ERISA, the Secretary has a substantial interest in this case.

STATUTORY PROVISIONS INVOLVED

The pertinent provisons of ERISA are reproduced in the Appendix to this brief, *infra*, 1a-3a.

STATEMENT

1. Petitioners are former employees of the Kaiser Steel Corporation and participants in the Kaiser Steel Retirement Plan, a qualified pension plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*[1] In 1980, while respondent was serving as the plan's actuary, Kaiser began to phase out its steelmaking operations. That action resulted in the early retirement of a large number of employees. Respondent, however, continued to use actuarial assumptions that did not reflect the increased costs the early retirements would impose on the plan. As a result, Kaiser did not adequately fund the plan, and plan assets became insufficient to satisfy benefit obligations. By early 1987, the Pension Benefit Guaranty Corporation (PBGC) had determined that the plan was underfunded and incapable of paying its liabilities. The PBGC terminated the plan and began paying its participants substantially reduced benefits. J.A. 3-7; see Pet. App. A2-A3, A17-A18.

2. In December 1989, petitioners filed this action alleging that respondent had violated ERISA and state

[1] This case was decided on a motion to dismiss and therefore the allegations of petitioners' complaint are taken as true. See Pet. App. A2, A19.

malpractice law. Petitioners claimed that respondent had caused losses to the plan by allowing Kaiser to set actuarial assumptions, failing to disclose that it served as an actuary for both Kaiser and the plan, and failing to disclose the plan's funding inadequacies.[2] Petitioners argued that respondent violated ERISA by breaching respondent's professional duties to the plan[3] and by participating in an unlawful party-in-interest transaction.[4] When respondent moved to dismiss the complaint for failure to plead causes of action cognizable under ERISA, petitioners advanced several legal theories: (1) that respondent was an ERISA fiduciary that breached its fiduciary duties; and (2) that even if respondent was not a fiduciary, it was liable under

[2] Petitioners also filed suit against members of the Investment Committee of the Kaiser Steel Retirement Plan, alleging that they had violated their fiduciary duties. See *Mertens* v. *Black*, 948 F.2d 1105 (9th Cir. 1991) (upholding district court's refusal to dismiss petitioners' claims against investment committee members).

[3] ERISA imposes various requirements concerning actuarial services. See, *e.g.*, 29 U.S.C. 1023(d) (certain ERISA plan administrators must prepare annual reports including statements by enrolled actuaries) and 1082(c)(3)(B) (costs, liabilities, interest rates, and other factors are to be calculated on the basis of "reasonable" actuarial assumptions that offer the actuary's "best estimate of anticipated experience under the plan"). Petitioners alleged that respondent's actions in providing actuarial services did not comply with the obligations set forth in ERISA and implementing regulations. J.A. 9-13.

[4] ERISA forbids various transactions between a plan and a "party in interest," including the furnishing of services. 29 U.S.C. 1106(a)(1)(C). The statute defines the term "party in interest" to include a "person providing services to [the] plan," 29 U.S.C. 1002(14)(B), but exempts from the prohibitions of Section 1106 any service contract for which "no more than reasonable compensation is paid." 29 U.S.C. 1108(b)(2). Petitioners claimed that respondent's fees were not "reasonable" because respondent's conflict of interest prevented it from providing adequate services to the plan. J.A. 13-14.

ERISA (a) for breaching nonfiduciary duties imposed on an actuary by ERISA or (b) for knowing participation in a breach of duty by a fiduciary. J.A. 9-14; see Pet. App. A2-A4.

The district court dismissed all of petitioners' claims. Pet. App. A17-A30.[5] The court dismissed the claim that respondent itself was a fiduciary based on its conclusion that professional service providers such as actuaries, attorneys, and accountants do not act as fiduciaries when they perform their ordinary duties. *Id.* at A20-A22. The court also dismissed petitioners' claim for monetary relief based on respondent's alleged violation of its actuarial duties. In the court's view, Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), would not allow that type of relief because petitioners had not alleged that respondent had profited from the alleged violation. Pet. App. A23-A25. The court also rejected petitioners' "prohibited transaction" claim, which it characterized as merely an effort to recast the claimed breach of professional duty as a prohibited transaction. *Id.* at A25-A26. Finally, the court dismissed petitioners' claim that ERISA created a right of recovery against respondent as a knowing participant in a fiduciary breach, based on the Ninth Circuit's decision in *Nieto* v. *Ecker*, 845 F.2d 868 (1988), which held that ERISA bars such an action.[6] Pet. App. A22.

[5] The Pension Benefit Guaranty Corporation (PBGC) was named as a defendant in its capacity as the plan's statutory trustee. It answered and filed a cross-claim asserting that any recovery by petitioners should be paid to it. When the district court dismissed the action, it also dismissed the PBGC's cross-claim. See Pet. ii.

[6] The district court also held that petitioners' pendent state-law claim for professional negligence was barred by the State's two-year statute of limitations. Pet. App. A26-A27.

3. The court of appeals affirmed with respect to the ERISA claims.[7] Pet. App. A1-A13. With respect to the claim now at issue, the court relied on its holding in *Nieto* that ERISA "limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable." *Id.* at A7 (quoting *Nieto*, 845 F.2d at 871). The court also rejected (Pet. App. A8-A9) petitioners' argument that the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 2101(a), 103 Stat. 2123, demonstrates that Section 502(a) authorizes a remedy against nonfiduciaries for knowing participation in a breach of fiduciary duty. OBRA amended ERISA to add Section 502(*l*), 29 U.S.C. 1132(*l*) (Supp. II 1990) (App., *infra*, 2a-3a), which authorizes the Secretary of Labor to assess a civil penalty against fiduciaries and "other person[s]" for a breach of fiduciary duty under ERISA or for "knowing participation" in such a breach. The court noted that Section 1132(*l*) applies only to the Secretary, and noted that the Congress that passed OBRA considered, but did not adopt, an amendment that explicitly would have overturned the result in *Nieto*. Pet. App. A8-A9.[8]

SUMMARY OF ARGUMENT

1. Section 502(a)(3) of ERISA grants any beneficiary of a plan covered by ERISA the right to sue for any "equitable relief" that is "appropriate * * * to redress * * * vio-

[7] The court reversed the trial court's ruling that petitioners' state-law professional negligence claim was barred by the statute of limitations. Pet. App. A11-A13.

[8] Petitioners filed a petition for rehearing with a suggestion of rehearing en banc, supported by the Secretary of Labor as an amicus curiae, urging the Ninth Circuit to overrule *Nieto*. The court of appeals denied the petition and rejected the suggestion for rehearing en banc. Pet. App. A15-A16.

lations [of 29 U.S.C. 1001-1168 or the plan]." 29 U.S.C. 1132(a)(3). The sole issue in this case is whether the relief petitioners seek – to be made whole for losses they suffered because of a breach of fiduciary duty in which respondent is alleged to have knowingly participated – is "appropriate equitable relief" to "redress" that breach.

2. Principles of equity traditionally applicable to cases involving trusts support petitioners' claim. First, courts of equity regularly awarded make-whole monetary damages to beneficiaries to redress violations of a breach of trust. Although such damages resemble compensatory damages awarded in courts of law, the equitable status of trusts historically made courts of equity the only forum authorized to provide such redress. Second, courts of equity did not limit beneficiaries' remedies to those against the trust's fiduciary, but also ordered third parties who knowingly participated in the breach of fiduciary duty to compensate beneficiaries for resulting losses. Hence, the relief sought by petitioners would have been available as a matter of course in a case in equity arising before ERISA's enactment.

But the broad preemption provision set forth in Section 514(a) of ERISA preempts all state laws that "relate to" any covered plan. Because the scope of the fiduciary duties with respect to an ERISA plan is now exclusively a matter of federal law, the States are no longer able to afford relief for breaches of fiduciary duty that involve an ERISA plan. Unless the general provision of Section 502(a)(3) provides the relief formerly available in courts of equity, ERISA will have left beneficiaries in a worse position than they were prior to ERISA's enactment. In light of ERISA's open-ended authorization to award "equitable relief" in Section 502(a)(3), ERISA should not be construed to require such a result.

3. Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*) (Supp. II 1990), confirms that ERISA did not abolish the equitable liability of nonfiduciaries. That provision explicitly authorizes the Secretary to seek a civil penalty not only for breach of fiduciary duty by "a fiduciary," Section 502(*l*)(1)(A), but also for "knowing participation in such a breach * * * by any other person," Section 502(*l*)(1)(B). Moreover, Section 502(*l*)(2)(B) defines the civil penalty to be assessed by the Secretary in terms of the amounts obtained in suits brought by the Secretary against "other person[s]" under Section 502(a)(5) of ERISA. Section 502(*l*) thus is premised on the Secretary of Labor's ability to secure, as "other appropriate equitable relief * * * to redress such violation" under Section 502(a)(5), a make-whole monetary recovery against nonfiduciaries who knowingly participate in a breach of fiduciary duty. Because the right of action granted to the Secretary by Section 502(a)(5) is coextensive with the private right of action under Section 502(a)(3) at issue in this case, the reference in Section 502(*l*) to suits against "other person[s]" demonstrates that Section 502(a)(3) must permit such suits against persons other than a fiduciary.

4. Finally, the relief sought by petitioners is not inconsistent with this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). The Court in *Russell* held that a participant could not receive damages under Section 502(a)(2) for bad-faith processing of her claim for benefits, in excess of the damages available to her under the express terms of Section 502(a)(1)(B). The plaintiff in that case relied expressly on Section 502(a)(2), and the Court explicitly declined to consider the availability of relief under any other provision of ERISA. 473 U.S. at 139 n.5.

Moreover, reading *Russell* to preclude courts from granting any remedies beyond the specific remedies defined in detail in Section 502(a) would nullify the general provisions for "appropriate equitable relief" set forth in

Sections 502(a)(3) and 502(a)(5). Section 502 establishes a comprehensive enforcement scheme, with several remedies outlined in detail and two general provisions directing courts to develop remedies in light of underlying equitable principles. A ruling that relief is invariably limited to the basic remedies would contravene the language and structure of the statute as a whole.

ARGUMENT

ERISA AUTHORIZES CLAIMS AGAINST NONFIDUCIARIES WHO KNOWINGLY PARTICIPATE IN FIDUCIARY BREACHES

A. *Section 502(a)(3) of ERISA Authorizes Federal Courts To Award "Appropriate Equitable Relief * * * To Redress * * * Violations" of ERISA*

Part 4 of Title I of ERISA, 29 U.S.C. 1101-1114, titled "Fiduciary Responsibility," imposes a series of duties on fiduciaries who administer employee benefit plans. For example, Section 404, 29 U.S.C. 1104, enumerates certain fiduciary duties; Section 406, 29 U.S.C. 1106, specifies certain prohibited transactions; and Section 412, 29 U.S.C. 1112, establishes bonding requirements for officials who handle plan assets. In turn, Section 409 of ERISA, 29 U.S.C. 1109, authorizes three specific remedies against fiduciaries who breach those duties. First, a fiduciary is "personally liable to make good to [the] plan any losses * * * resulting from each * * * breach" of fiduciary duty. 29 U.S.C. 1109(a). Second, a court may order a breaching fiduciary to "restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." *Ibid.* Third, a fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." *Ibid.*

Part 5 of Title I of ERISA, 29 U.S.C. 1131-1145, titled "Administration and Enforcement," sets forth the general remedial framework for Title I of ERISA. Section 501, 29 U.S.C. 1131, establishes criminal penalties; Section 502, 29 U.S.C. 1132, authorizes six different civil actions, described in the six numbered paragraphs of subsection 502(a). This case involves the second and third of those six paragraphs. The second paragraph, 29 U.S.C. 1132(a)(2), authorizes an action "for appropriate relief under [Section 409]." The third paragraph, on which petitioners' action rests, permits an action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations." 29 U.S.C. 1132(a)(3).

By contrast to Sections 409 and 502(a)(2) – provisions limited by their terms to relief against "[a]ny person who is a fiduciary," 29 U.S.C. 1109(a) – nothing in Section 502(a)(3) limits the class of permissible defendants. Hence, the language of Section 502(a)(3) establishes a general cause of action, available to any "participant, beneficiary, or fiduciary," for any "equitable relief" that is "appropriate * * * to redress * * * violations [of subchapter I or the plan]." Because (i) it is undisputed that petitioners were "participants" in the plan and (ii) petitioners have alleged that the actions in which respondents participated violated a "provision of th[e] subchapter"[9] or the terms of the plan, the sole issue before the Court is whether "appropriate equitable relief" includes the relief sought by petitioners: recovery from a nonfiduciary of losses a plan suffers because of a fiduciary breach in which the nonfiduciary knowingly participated. For the reasons discussed be-

[9] Section 502 appears in Subchapter I of Chapter 18 of Title 29, which includes 29 U.S.C. 1001-1168.

low, we believe – as do the majority of the courts of appeals[10] – that it does.

B. ***Appropriate Equitable Relief Includes a Monetary Judgment Requiring a Nonfiduciary Who Knowingly Participates in a Breach of Fiduciary Duty To Redress Losses Suffered by the Plan as a Result of the Breach***

Under traditional equitable principles, the relief sought by petitioners would have been available before ERISA. Because ERISA preempts the remedies traditionally available under state laws that relate to covered employee benefit plans – whether based on a statute or common law – a conclusion that Section 502(a)(3) does not provide the relief sought in this case would require the conclusion that Congress intended to curtail that traditional form of relief when it acted to protect employee benefit plans in passing ERISA. That conclusion is untenable.

1. Traditional equitable principles provide make-whole relief to beneficiaries of a trust harmed by a nonfiduciary who participates in a breach of trust

"ERISA abounds with the language and terminology of trust law"; as a result, courts are to consult "general principles of trust law" developed by courts of equity[11] to de-

[10] See *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 279-281 (2d Cir. 1992); *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), cert. denied *sub nom. Klepak* v. *Dole*, 490 U.S. 1089 (1989); *Brock* v. *Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Thornton* v. *Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); see also *Fink* v. *National Savings & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum). But see *Nieto* v. *Ecker*, 845 F.2d 868, 870-873 (9th Cir. 1988); *Useden* v. *Acker*, 947 F.2d 1563, 1582 (11th Cir. 1991), petition for cert. pending, No. 91-1944 (filed June 1, 1992).

[11] It should be beyond dispute that the reference to "equitable relief" refers to relief available in courts of equity. See *Black's Law*

termine what types of "equitable relief" are "appropriate" to "redress" violations under Section 502(a)(3). *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110, 115 (1989); see *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985) (courts should consider "the common law of trusts"). Two of those principles demonstrate that the relief sought by petitioners is "appropriate equitable relief": courts of equity awarded make-whole monetary relief to redress a breach of trust; and courts of equity awarded relief against a nonfiduciary who participated in a breach of trust by a fiduciary.[12]

Dictionary 539 (6th ed. 1990) (defining "equitable relief" as "[t]hat species of relief sought in a court with equity powers").

[12] The Eighth and Ninth Circuits have stated that the reference in Section 502(a)(3) to "other appropriate equitable relief" should be construed to include only three categories of relief: injunctions to prevent violations of fiduciary duty, imposition of a constructive trust on plan assets, and removal of trustees. See, *e.g.*, *Sokol* v. *Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986); *Novak* v. *Andersen Corp.*, 962 F.2d 757, 760 (8th Cir. 1992), petition for cert. pending, No. 92-352 (filed Aug. 26, 1992). Those decisions rely to a significant degree on the fact that the Senate Report offers those three types of relief as examples of appropriate equitable relief. See S. Rep. No. 383, 93d Cong., 1st Sess. 105-106 (1973). There is no indication in the report, however, that the passage was intended as an exhaustive catalogue of the types of relief that would be available under Section 502(a)(3); indeed, the relevant passage begins with the phrase "[f]or example." *Id.* at 105. The best guide for determining what types of relief should be available is the statutory language – which refers generally to the readily comprehensible concept of "equitable relief" – not a list of examples offered in the legislative history. See *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U.S. 633, 649 (1990).

a. In the realm of trust law, make-whole monetary relief has long been a traditional equitable remedy. The Second Restatement of Trusts illustrates this conclusion. Section 199 sets forth the "equitable remedies" available to the beneficiary of a trust. The third of these, set forth in Section 199(c), allows the beneficiary "to compel the trustee to redress a breach of trust." 1 Restatement (Second) of Trusts 437 (1959). The comment to Section 199(c) explains that the suit to gain redress should be governed by Section 205 of the Restatement, see *id.* comment c, at 438, which permits an award of monetary relief by making the trustee liable for any "loss" to the trust caused by a breach of fiduciary duty.[13] Indeed, each of the ten illustrations in the comments to Section 205 involves a monetary award against the trustee. *Id.* comments c-h, at 459-462.[14]

Moreover, it is clear that the monetary relief available under Section 205 included a right to "make-whole" damages. Comment a explains that the beneficiary has a number of options, one of which is "the option * * * of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust." 1 Restatement (Second) of Trusts 458 (1959). Thus, "the general rule [is] that the object of damages is to make the injured party whole, that is, to put

[13] Section 205 provides that a trustee who has committed a breach of trust "is chargeable with (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or (b) any profit made by him through the breach of trust; or (c) any profit which would have accrued to the trust estate if there had been no breach of trust." 1 Restatement (Second) of Trusts 458.

[14] For example, Illustration 5 provides: "A is trustee of $10,000 in cash. He deposits the money in a bank which he knows or has reason to know is insolvent. The bank fails and A recovers only $4000 from the bank. A is liable for the loss." 1 Restatement (Second) of Trusts 459.

him in the same condition in which he would have been if the wrong had not been committed and the trustee had done his duty. Both direct and consequential damages may be awarded." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 701, at 198 (2d ed. rev. 1982) [hereinafter Bogert & Bogert] (footnote omitted) (liability for breach of investment duties); see *Russell,* 473 U.S. at 157 (Brennan, J., concurring); see also *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418-419 (1975) (application of similar principles of equity to Title VII).

As the materials discussed above demonstrate, respondent errs in suggesting (Br. in Opp. 8-9) that the make-whole relief requested by petitioners constitutes a "damage[s]" remedy not cognizable in equity.[15] "Trusts are, and have been since they were first enforced, within the peculiar province of courts of equity." 3 Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 197, at 188 (4th ed. 1988) [hereinafter Scott & Fratcher].[16] Thus, although a beneficiary's action to

[15] Respondent's analysis resembles the analysis of the Eleventh Circuit in *Useden* v. *Acker,* 947 F.2d 1563, 1580 (1991), petition for cert. pending, No. 91-1944 (filed June 1, 1992).

[16] See *Lessee of Smith* v. *McCann,* 65 U.S. (24 How.) 398, 407 (1861) (equity has "exclusive jurisdiction of trusts and trust estates"); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 1302, at 648 (W.H. Lyon, Jr. 14th ed. 1918) ("For the most part indeed matters of trust and confidence are exclusively cognizable in Courts of Equity; there being few cases except bailments, and rights founded in contract * * * in which a remedy can be administered in the Courts of Law."); 3 William Blackstone, *Commentaries on the Laws of England* *431 ("*fraud, accident,* and *trust* are the proper and peculiar objects of a court of equity"); Sir Edward Coke, *The First Part of the Institutes of the Laws of England* § 464, at 272b* (beneficiary of trust "had no remedie by the common law, but for breach of trust, his remedie was only by *subpoena* in chancerie").

recover losses resulting from a breach of duty superficially resembles an action at law for damages, such relief traditionally has been obtained in courts of equity.[17] Hence, because that relief is, by definition, "equitable relief," there is no reason it should not be available in an action under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3). See *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 486 (1990) (noting that "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits,' " and explaining that "[i]t is clear that the relief requested" in that case – which included a prayer for compensatory damages – "is well within the power of federal courts to provide" under ERISA).

b. It also is clear that equitable remedies for a breach of trust included monetary awards against nonfiduciaries who knowingly participated in a breach of trust. Again, the Second Restatement of Trusts is explicit. Section 326 provides that "[a] third person who * * * has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust." 2 Restatement (Second) of Trusts 124

[17] See, *e.g.*, 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 229 n.15 (Spencer W. Symons 5th ed. 1941) [hereinafter Pomeroy] (explaining that the equitable liability for breach of trust is "of the same nature as that arising from breach of contract"); 3 William Blackstone, *Commentaries on the Laws of England* *439 ("The form of a trust * * * gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, * * * but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed."); see also F.W. Maitland, *Equity* 110-111 (2d ed. 1936) (explaining that the historical reason trusts were not enforced at law apparently was that "the Chancellors were beforehand in this matter and, by giving a far more perfect remedy than the common law courts could give, made any remedy in those courts unnecessary").

(1959).[18] This Court also has recognized that principle. *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942) ("It is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with the knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary.").[19] Thus, if a trustee's agent knowingly participates and assists in a breach of fiduciary duty, the agent could be held liable for losses arising from the breach. See, *e.g.*, 4 Scott & Fratcher, *supra*, § 326.4, at 310-313; 2 Restatement (Second) of Trusts, *supra*, § 326 comment a, at 124. Allegations such as those made by petitioners – that an actuary knowingly participated in a breach of fiduciary duty while acting as the fiduciary's

[18] Treatises and commentators uniformly have supported this view as well. Bogert & Bogert, *supra*, § 901, at 257 ("[T]he beneficiary, as equitable owner of the trust res has the right that third persons shall not knowingly join with the trustee in a breach of trust."); 4 Scott & Fratcher, *supra*, § 326.5, at 314 ("Wher[illegible] third person knowingly and actively participates in the breach of [illegible]ere is no difficulty in holding him liable."); Austin Wakeman [illegible]t, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 481 (1921) [hereinafter Scott] ("If third persons knowingly participate with a fiduciary in a breach of his obligations it is proper to hold them liable."); 4 Pomeroy, *supra*, § 1080, at 230 ("If third persons are parties to a breach of trust, they are equally liable with the trustee.").

[19] State court decisions also have recognized this principle. See, *e.g.*, *First National Bank of Kingman* v. *Byrnes*, 59 P. 1056, 1058 (Kan. 1900) ("As a general principle, all persons who knowingly participate or aid in committing a breach of trust are responsible for the wrong, and may be compelled to make good the loss."); *Wechsler* v. *Bowman*, 34 N.E.2d 322, 326 (N.Y. 1941) ("The principle of law which the plaintiff urges has been reiterated by this court many times. Any one who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby to the cestuis que trust.").

agent – accordingly would be sufficient to state a cause of action in equity under traditional principles of trust law.[20]

2. The relief sought by petitioners is appropriate because it ensures that ERISA affords beneficiaries no less protection than they would have had in courts of equity before ERISA

As this Court has explained, "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.' " *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989) (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)); see 29 U.S.C. 1001(b) ("[T]he policy of [ERISA is] to protect * * * the interests of participants in employee benefit plans and their beneficiaries.").[21] Thus, the Court has been reluctant to interpret ERISA in a way that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted," *Firestone*, 489 U.S. at 114, and has never interpreted ERISA to circumscribe the equitable remedies available at common law. Adopting the rule established by the court of appeals, however, would do just that.

[20] There is no doubt that the cause of action lies in equity. See, *e.g.*, *Seminole Nation*, 316 U.S. at 296; Scott, *supra*, 34 Harv. L. Rev. at 454 ("Anyone who participates with a trustee in a breach of trust may be held liable in a court of equity. * * * [I]f he has never received or no longer holds the trust property or its proceeds, he may be held liable in equity for damages."); Bogert & Bogert, *supra*, § 901, at 257 (rights of beneficiary rest on status "as equitable owner of the trust res"); *Cahall* v. *Lofland*, 114 A. 224, 237 (Del. Ch. 1921) ("One who participates with a trustee in a breach of trust may be held liable in a court of equity."), *aff'd*, 118 A. 1 (Del. 1922); *Whitford* v. *Reddeman*, 219 N.W. 361, 365-366 (Wis. 1928) ("[T]he power to compel an accounting by a trustee, and to hold those liable with him for mismanagement of the trust are well-recognized and well-defined powers of a court of equity.").

[21] The legislative history underscores this purpose. See 120 Cong. Rec. 29,932 (1974) (remarks of Sen. Williams) (the objectives of ERISA's fiduciary-related provisions "are to make applicable the law of trusts; * * * to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust").

With exceptions not relevant here, Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any [covered] employee benefit plan." 29 U.S.C. 1144(a). Hence, ERISA preempts any cause of action dependent on proof that the defendant participated in a breach of a fiduciary duty to an ERISA plan, because any such cause of action would "relate to" the plan by considering the duties imposed on fiduciaries of the plan. See *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990) (cause of action for wrongful termination to avoid paying benefits is preempted); *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987) (common-law causes of action based on improper processing of a claim for benefits "undoubtedly meet the criteria for pre-emption"). Hence, ERISA leaves the States powerless to provide beneficiaries with a state-law remedy against nonfiduciaries. Any right of recovery dependent on proof that the defendant participated in a breach of a fiduciary duty to an ERISA plan would be preempted.[22]

[22] If ERISA did not preempt state-law causes of action in the area, matters would be just as unsatisfactory, because the "liability of non-fiduciaries would be assessed by varying state laws, while the conduct and liability of the fiduciary whom the third party is claimed to have knowingly assisted in breaching a duty would be governed by federal law." *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281 (2d Cir. 1992). Such a result would interfere significantly with Congress's patent intent to bring uniformity to the administration of employee benefit plans. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9-10 (1987).

Fiduciaries will not always have the financial capability to provide complete relief. See, *e.g.*, *Brock* v. *Gerace*, 635 F. Supp. 563, 569 (D.N.J. 1986). The absence of a remedy against nonfiduciaries therefore will prevent beneficiaries in some cases from being made whole. In our view, and in the view expressed by common-law courts for centuries, it is inequitable to require innocent beneficiaries to sustain such a loss, instead of the individuals who knowingly participated in the fiduciary's wrongful conduct. Because ERISA defines the scope of available relief through principles of equity, that traditional view of what is equitable in these circumstances should preclude dismissal of petitioners' claims.

In sum, the traditional existence of a right of equitable recovery for individuals in the position of petitioners, coupled with ERISA's broad preemption clause, provides powerful support for the conclusion that the remedy sought by petitioners is "appropriate equitable relief" to "redress" the alleged violations of ERISA and the plan.

C. *The Availability of a Civil Penalty Against Nonfiduciaries Under Section 502(l) of ERISA Demonstrates the Propriety of Awarding Such Relief Under Section 502(a)(3)*

1. Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*) (Supp. II 1990) confirms that Section 502(a)(3) should be interpreted to authorize monetary relief against nonfiduciaries. Section 502(*l*)(1) provides in relevant part:

> In the case of –
>
> (A) any breach of fiduciary responsibility under * * * part 4 of this subtitle by a fiduciary, or
>
> (B) any knowing participation in such a breach * * * by any other person,
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

Section 502(*l*)(2)(B), in turn, defines the term "applicable recovery amount" to include "any amount * * * ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section." 29 U.S.C. 1132(*l*)(2)(B) (Supp. II 1990).

Because Section 502(*l*)(2)(B) by its terms applies only to actions instituted under Sections 502(a)(2) and 502(a)(5), the reference to sums recovered from a fiduciary "or other person" necessarily indicates that it is possible to recover sums from "other person[s]" under at least one of those two subsections. Because Section 502(a)(2) authorizes only "relief under [Section 409]," and because Section 409 authorizes relief only against "[a]ny person who is a fiduciary," Section 502(a)(5) is the only provision under which the Secretary plausibly could recover sums from any "other person." The authority granted to the Secretary by Section 502(a)(5), however, is substantively identical to the authority granted to beneficiaries under Section 502(a)(3) to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter."[23] Hence, the only logical alternatives to our reading of Section 502(a)(3) are (a) to conclude that the reference to an "other person" in Section 502(*l*)(2)(B) was erroneous, or (b) to hold that the substantively identical passages in Sections 502(a)(3) and 502(a)(5) have different meanings. Neither course comports with ordinary principles of statutory construction. See, *e.g.*, *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990) ("[A] court

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[23] The only difference between the provisions is that Section 502(a)(3) contains plural references to "violations" and "provisions" of ERISA, where Section 502(a)(5) contains singular references to a "violation" and a "provision" of ERISA.

should give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)); *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) (noting "the basic canon of statutory construction that identical terms within an Act bear the same meaning"); *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2251 (1992) (Scalia, J., concurring) ("[C]onsistency of usage within the same statute is to be presumed."). Therefore, Section 502(*l*) indicates that Section 502(a)(3)'s grant of power to afford "appropriate equitable relief" includes the power to afford the time-honored equitable remedy granting make-whole monetary relief against nonfiduciaries who knowingly participate in breaches of fiduciary duty.[24]

2. Notwithstanding the import of Section 502(*l*) explained above, the court of appeals concluded that the statute that enacted Section 502(*l*)—the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 2101, 103 Stat. 2123—actually supports the position of respondent. The court noted that when Congress enacted OBRA, it considered and did not enact an amendment to ERISA that explicitly would have authorized claims

[24] Section 4975 of the Internal Revenue Code also indicates that Section 502(a)(3) authorizes actions against nonfiduciaries. That provision, which was enacted contemporaneously with Title I of ERISA, levies a tax on "disqualified person[s]" who engage in prohibited transactions, a class of persons that includes nonfiduciaries. 26 U.S.C. 4975(a) and (b); see *Nieto*, 845 F.2d at 874 n.6. The provision provides that before sending a notice of deficiency to such parties, the Secretary of the Treasury shall notify the Secretary of Labor to give her a reasonable opportunity to obtain a correction of the prohibited transaction. 26 U.S.C. 4975(h). The only way the Secretary of Labor could obtain a correction, however, would be by a civil action pursuant to Section 502(a)(5) against the "disqualified person." Thus, 26 U.S.C. 4975, like Section 502(*l*) of ERISA, rests on the premise that Section 502(a)(5), and thus Section 502(a)(3) as well, allows actions against parties other than fiduciaries.

against persons who knowingly participate in fiduciary breaches. See H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6)(A) (1989), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). As this Court repeatedly has indicated, however, Congress's failure to act "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.' " *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States* v. *Wise*, 370 U.S. 405, 411 (1962)).

In this case, two of the circumstances surrounding OBRA's enactment support the inference that Congress failed to act because of its view that ERISA already authorized the relief sought by petitioners, not because it wished to deny that relief. First, the House Report accompanying OBRA noted that, at the time of the proposed amendment, "[a]ll but one of the Circuit Courts of Appeal that ha[d] considered the issue ha[d] held that the broad remedial powers conferred on federal courts under ERISA section 502(a)(3) and (5) create an implied cause of action against non-fiduciaries who knowingly participate in breaches of fiduciary duty proscribed by ERISA." H.R. Rep. No. 247, 101st Cong., 1st Sess. 77 (1989). The Ninth Circuit alone had held to the contrary. See *ibid.* It is implausible to infer that congressional inaction reflected acquiescence in what Congress apparently understood to be the minority view of the statute. Second, the amendment was proposed to "clarif[y]" the existence of a right of action against nonfiduciaries. *Ibid.* Starting from that motivation, it would have been reasonable for Congress to remove the amendment when it chose to enact another provision—Section 502(*l*)—that indicated that such relief was available. Accordingly, Congress's failure to overrule *Nieto* expressly does not undermine the strong indication

Section 502(*l*) offers: Section 502(a)(3), like Section 502(a)(5), allows monetary relief against nonfiduciaries who knowingly participate in a breach of trust with respect to an ERISA plan.

D. *This Court's Decision In* Massachusetts Mutual Life Insurance Co. *v.* Russell *Does Not Foreclose the Claim for Relief in This Case*

1. Interpreting ERISA to incorporate the trust-law principles of nonfiduciary liability also is consistent with *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), on which the Ninth Circuit relied to support its contrary conclusion in *Nieto*, 845 F.2d at 872. In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of her claim for benefits, asserting a right to recover compensatory and punitive damages that were not available under the terms of the plan. But the remedy in Section 502(a)(1)(B) for a beneficiary who is denied benefits wrongfully allows the beneficiary only "to recover benefits due to him *under the terms of his plan*." 29 U.S.C. 1132(a)(1)(B) (emphasis added). Accordingly, because the beneficiary was seeking relief in excess of the relief available under Section 502(a)(1)(B), the beneficiary relied on Section 502(a)(2), 29 U.S.C. 1132(a)(2), which permits a beneficiary to sue a fiduciary for a breach of fiduciary duty under Section 409. See *Russell*, 473 U.S. at 139-140.

The Court declined to read Section 409 as enlarging the beneficiary's "explicitly authoriz[ed]" (473 U.S. at 144) right to recovery for wrongful denial of benefits. Relying heavily on the overall purpose of Section 409(a) – which provides that a fiduciary "with respect to [an ERISA] plan" is personally liable to "make good to such plan any losses to the plan" that result from a breach of the fiduciary's duties – the Court concluded that the general reference to "other equitable or remedial relief" that appears in Section 409(a) authorizes only " 'plan-related' relief," which could not encompass a right to recover damages on a beneficiary's own account. 473 U.S. at 142.

2. For several reasons, *Russell* is not controlling here. First, and most obviously, the beneficiary in *Russell* sued exclusively under Sections 409 and 502(a)(2), and placed no reliance on Section 502(a)(3), the provision at issue in this case. *Russell*, 473 U.S. at 139 n.5 (respondent "expressly disclaim[ed] reliance on § 502(a)(3), [so] we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages"); see *id.* at 149 (Brennan, J., concurring).

Second, the question at issue in this case is quite different from the question at issue in *Russell*. As noted above, *Russell* involved a claim for relief brought by a beneficiary against a fiduciary, based on a particular violation, with respect to which the provisions of Sections 409 and 502(a) provided for a specified recovery that was less than the recovery sought by the beneficiary; moreover, it was not suggested that the relief was traditionally available under the law of trusts. By contrast, the beneficiary here is attempting to obtain "equitable relief" as authorized by the statute; the only question is whether the statutory term includes make-whole monetary relief against nonfiduciaries. In answering that question, we believe that it is entirely consistent with *Russell* to interpret ERISA (as the Court did in *Firestone*) to carry forward traditional principles of trust law.

Finally, a broad reading of *Russell* barring the relief sought in this case would render Section 502(a)(3)(B) essentially useless, because Section 409 and the other provisions of Section 502(a) already authorize removal of the trustee, as well as declaratory and injunctive relief to

prevent future violations. If "other appropriate equitable relief * * * to redress * * * violations" does not include other types of relief courts of equity would have issued to redress violations of fiduciary duties, then it has no substantial purpose. See *Russell*, 473 U.S. at 155 (Brennan, J., concurring); compare, *e.g.*, *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990) ("[A] court should give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).

3. Although portions of the Court's opinion in *Russell* reflect reluctance to recognize new remedies that Congress "simply forgot to incorporate" in ERISA, 473 U.S. at 146 – on the theory that implying new remedies would render the existing remedies set forth in Sections 409 and 502(a)(1)(B) superfluous – that concern is not implicated here. Section 409 not only provides general authority to award appropriate relief against a fiduciary who breaches his duties under ERISA, but also provides that a fiduciary shall be subject to certain very definite remedies for breaching the duties imposed under ERISA: make-whole relief for the plan, disgorgement of profits earned in breach of trust, and removal of a fiduciary. 29 U.S.C. 1109(a). Even if Section 502(a)(3) authorizes courts to derive the same remedies by incorporating equitable trust principles into ERISA, the enumeration of certain remedies in Section 409 would not be superfluous, because it would ensure that the specified relief would be available irrespective of the federal courts' conclusions regarding the content of the equitable principles incorporated into Section 502(a)(3). In effect, therefore, Section 409, as implemented by Section 502(a)(2), places a floor under the types of relief available from a fiduciary.

In sum, Section 502(a)(2) and the other precise remedial provisions Congress included in Section 502(a) form the first part of the "comprehensive civil enforcement scheme"

set forth in Section 502(a), *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 485 (1990); they establish the basic minimum remedies. Sections 502(a)(3) and 502(a)(5) complete the scheme, by broadly authorizing courts to develop other remedies as appropriate in light of the equitable principles underlying ERISA, as modified in light of ERISA's particular terms. Because those principles allow beneficiaries to seek make-whole relief from nonfiduciaries, Section 502(a)(3) should do the same.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1992

APPENDIX

ERISA § 409(a), 29 U.S.C. 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

ERISA § 502(a), 29 U.S.C. 1132(a), provides:

> **Persons empowered to bring a civil action**
>
> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

ERISA § 502(*l*), 29 U.S.C. 1132(*l*) (Supp. II 1990) provides:

Civil penalties on violations by fiduciaries

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

ERISA § 514(a), 29 U.S.C. 1144(a), provides:

Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1992

No. 91-1671

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,
Petitioners,
v.

HEWITT ASSOCIATES, an Illinois Partnership,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons is a non-profit membership organization of approximately 34 million working and retired persons age 50 and older. One of AARP's primary objectives is to promote the economic security of individuals as they age. Through educational and advocacy efforts, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension and health plans.

AARP's members, and other older Americans who depend on private employer-sponsored pension and health

plans subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, have a stake in the reversal of the decision below, which holds that individuals who knowingly participate in a breach of trust by a fiduciary have no liability under federal law to the plan participants they harm. The result of the alleged breach in this case, and of respondent's alleged "knowing participation" in the breach, was the insolvency of Petitioners' pension plan. The Pension Benefit Guaranty Corporation assumed responsibility for paying plan benefits, but only to the extent benefits were guaranteed under Title IV of ERISA, *see* ERISA § 4022, 29 U.S.C. § 1322. Because Petitioners' plan benefits exceeded the maximum guarantee amounts, Petitioners lost significant portions of the pensions that they earned during their working lives and on which they depend to support themselves in retirement.

The decision below, which is contrary to the holdings of four other circuit courts of appeals, threatens the security of retired and working Americans' interests in hundreds of thousands of pension and welfare benefit plans subject to ERISA. AARP has a substantial interest in the resolution of the issue, which has a direct and vital bearing on our members' retirement security.

STATEMENT OF THE CASE

AARP adopts Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

Construing ERISA to authorize a cause of action against a non-fiduciary for its knowing participation in a fiduciary breach is consonant with the language and purpose of the statute. Congress provided for "appropriate equitable relief" under ERISA Section 502(a)(3) and this Court's precedents make clear that the courts may derive that relief from the emerging federal common law. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Under trust law principles, with which ERISA "abounds," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), equitable relief can include compensatory damages against a person who knowingly participates in another person's breach of trust. The contrary interpretation of the court below is wrong because it ignores these traditional equity and trust principles and the broad language of Section 502(a)(3).

The decision below also undermines the primary purpose of ERISA to protect the interests of participants by providing appropriate remedies and sanctions. *See* ERISA Section 2(b), 29 U.S.C. § 1001(b). The effect of the court of appeals' holding is to deny participants recourse against those whose improper actions enabled a fiduciary to violate its statutory duties. Reversing the decision below and applying traditional trust rules which impose liability on non-fiduciaries would further ERISA's purposes by preventing and deterring violations of the statute's fiduciary requirements.

ARGUMENT

I. ERISA SECTION 502(a)(3) CREATES FEDERAL JURISDICTION OVER A PARTICIPANT'S CIVIL ACTION AGAINST A PERSON WHO KNOWINGLY PARTICIPATES IN A FIDUCIARY'S BREACH OF TRUST.

Petitioners seek relief against Hewitt Associates, whom Petitioners allege knowingly participated in an ERISA fiduciary's breach of trust. (J.A. 38). Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides that a participant may bring a civil action to obtain appropriate equitable relief to redress violations or enforce provisions of ERISA. The statutory question before the Court is thus straightforward: is "equitable relief" under Section 502(a)(3) available against a person who knowingly assists a fiduciary in a breach of the fiduciary's responsi-

bility? The answer, under traditional equity jurisdiction, is that such relief is available.

Ignoring traditional equity principles, the court of appeals held that Congress intended to apply the term "equitable relief" narrowly under ERISA, limiting it to non-compensatory forms of relief. This restrictive interpretation of equitable relief is not only historically inaccurate, but is at loggerheads with the remedial purposes of ERISA. Moreover, four of the six courts of appeals that have considered the question have held to the contrary. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992); *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); *see also Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985).[1]

A. ERISA Section 502(a)(3) Embodies Trust Law Principles, Which Recognize A Cause Of Action Against A Person Who Knowingly Participates With A Fiduciary In A Breach Of Trust.

Courts of equity in both England and the United States have historically exercised jurisdiction over trusts. A. Scott & W. Fratcher, *The Law of Trusts* (4th ed. 1989) § 197, at 188. ("Trusts are, and have been since

[1] It is also a view that has been rejected by a number of district courts in other circuits. *See, e.g., Pension Benefit Guar. Corp. v. Ross*, 733 F. Supp. 1005, 1008 (M.D.N.C. 1990); *Pension Fund Local 701 v. Omni Funding Group*, 731 F. Supp. 161, 176-179 (D.N.J. 1990); *Brock v. Gerace*, 635 F. Supp. 563, 566 (D.N.J. 1986); *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1395-1396 (D. Nev. 1984); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-42 (W.D. Wisc. 1979).

they were first enforced, within the peculiar province of courts of equity."). The remedies utilized by equity courts concerning when trusts are in their purview are thus, by definition forms of equitable relief and are within the power of a federal court to award under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

There is no historical dispute concerning whether equity courts could award money damages against a person who knowingly participated in another person's breach of trust.

> Anyone who participates with a trustee in a breach of trust may be held liable in a court of equity to the cestui que trust. If he has received and still holds the trust property or its proceeds, he may be held as constructive trustee thereof; *if he has never received or no longer holds the trust property or its proceeds, he may be held liable in equity for damages.*

Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 454 (1921) (emphasis added). *See, e.g., Blythe v. Flagdale*, 1 Ch. 337, 351-52 (1889); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1112 (D.D.C. 1971); *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1057 (Del. Ch. 1984); *International Community Corp. v. Victory Young*, 486 So. 2d 629 (Fla. Dist. Ct. App. 1986); *Shuster v. North American Mortgage Loan Co.*, 40 N.E. 130, 143 (Ohio 1942). *See also* G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 901 (2d ed. 1982) (trust "beneficiary, as equitable owner of the trust res has the right that third persons shall not knowingly join with the trustee in a breach of trust."); Scott & Fratcher, *supra*, § 326.5; Restatement (Second) of Trusts § 326 (1959); Note, *Liability of Bank for Aiding Fiduciary in Purchase of Non-Legal Securities*, 47 Yale L.J. 299, 299 (1937) (noting "the firmly-rooted doctrine that anyone knowingly aiding or participating in a breach of trust is jointly and severally liable with the trustee.").

Given the traditionally accepted meaning of equitable relief, the language of Section 502(a)(3) authorizes a participant or beneficiary in an employee benefit plan to bring an action against a person who knowingly participates in a fiduciary's breach of duty under ERISA. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1982).

B. The Language And Purpose Of ERISA Support Equitable Relief Against Non-Fiduciaries.

The premise of the decision below is that if money damages were available under Section 502(a)(3), Section 409(a)'s language requiring that fiduciaries "make good . . . any losses to the plan resulting from such breach," 29 U.S.C. § 1109(a), would be rendered superfluous. The Ninth Circuit's limiting construction of Section 502(a)(3) is wrong because the provisions can be read to co-exist to provide the full range of equitable relief as Congress intended.

1. *The Ninth Circuit's Artificial Limitation On Equitable Relief Under ERISA Section 502(a)(3) Is Inconsistent With Congressional Intent.*

The object of statutory construction is to determine the intent of the legislature. *See Smith v. Wade*, 461 U.S. 30, 65 (1983). Canons of statutory construction are merely aids in determining the legislature's intent. "No single canon of interpretation can clarify with certainty exactly what the drafters intend." N. Singer, *Sutherland Statutory Construction* § 45.05, at 23 (5th ed. 1992).

The court of appeals, however, with a single-minded focus on one of a myriad of canons of statutory construction interpreted ERISA in a manner demonstrably in-

consistent with Congress' intent "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1982). Indeed, the Ninth Circuit's opinions in this case and in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), are utterly barren of any analysis of statutory purpose. The opinions fail to point to a single expression of statutory purpose in either ERISA or its voluminous legislative history that explains why Congress would want to insulate from liability aiders and abettors of fiduciaries who breach their statutory responsibilities. The result of this single-minded focus is so inconsistent with ERISA's purpose in that it affords "less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989).

ERISA's statement of purpose, its legislative history, and its interpretation by this Court, all stand in stark contrast to the rigid and mechanical approach that the court of appeals used in limiting Section 502(a)(3)'s reach. In ERISA's declaration of policy, Congress stated that ERISA was intended to "protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). The Ninth Circuit, in contravention of this purpose, would limit available remedies and, as this case so amply demonstrates, deny participants in employee benefit plans recourse in the federal courts to seek redress against parties whose improper actions enabled a fiduciary to violate its statutory duties. The Ninth Circuit's holding is thus at odds with ERISA's congressional declaration of policy.

It is also at odds with ERISA's legislative history. The bill that emerged from conference to become ERISA authorized participants to bring actions for equitable relief. The committee reports state that Congress intended

Section 502(a)(3) to provide "the full range of . . . equitable remedies available in both state and federal courts."[2] As discussed above, equity courts have long granted relief against non-fiduciaries for knowing participation in a trustee's breach. Therefore, interpreting ERISA to limit equitable relief would undermine the protection of employee interests that is at ERISA's core.

Moreover, this Court, reviewing ERISA's legislative history, has found that Congress intended for the federal courts "to develop a federal common law of rights and obligations under ERISA-regulated plans," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 110, quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). This authority includes the fashioning of appropriate equitable relief under ERISA Section 502(a)(3), *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 155 (1985) (Justice Brennan, concurring). *See also* 120 Cong. Rec. S29,942 (daily ed. Aug. 22, 1974) (remarks of Senator Javits, ranking minority member of Senate Labor Committee: Congress "intend[s] that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.").[3]

ERISA's legislative history points to the Labor-Management Act as a model for its own enforcement scheme. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5109. This Court has instructed that federal common law in the context of the Labor-Management Act involves

> looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem . . . . state law, if compatible . . . may be resorted to in order to find the rule that will best effectuate the federal policy.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) (citations omitted).

As this Court has noted, ERISA "abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 110. ERISA's overriding purpose is to protect the interests of participants in employee benefit plans. ERISA Section 2(b), 29 U.S.C. 1001(b). Therefore, it is natural for courts to turn to trust law for remedies that will enhance the protection of employee interests in pension and welfare plans. *See* 120 Cong. Rec. S29,932 (daily ed. Aug. 22, 1974) (comments of Senator Williams, Chair of the Senate Labor Committee: Congress intended in ERISA "to make applicable the law of trusts."). Such relief is "consonant with the purpose of the Act as declared by Congress and plainly disclosed by its structure." *Gruver v. Commissioner*, 142 F.2d 363, 366 (4th Cir. 1944).

2. *Equitable Remedies Under Section 502(a)(3) Are Available, Irrespective of ERISA Section 409(a).*

The premise of the court of appeals' analysis—that giving full effect to ERISA Section 502(a)(3) would render ERISA Section 409(a) a superfluity—is based on a mistaken understanding of the statute and how its enforcement provisions were constructed by Congress. The separate provisions do not limit the relief available to participants, but co-exist to provide a full range of remedies under ERISA.

[2] S. Rep. No. 127, 93d Cong., 2d Sess. 35, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838.

[3] The Ninth Circuit has itself observed that the congressional invitation to develop a body of common law granted "authority to the courts to develop principles governing areas of the law regulating employee benefit plans that had previously been the exclusive province of state law." *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984).

A plausible explanation for the interplay between Sections 409 and 502(a)(3) is evident from the statute itself. Part 4 of Title I of ERISA establishes standards for the behavior of fiduciaries. Section 409(a), which appears in this part of ERISA, mandates monetary awards against breaching fiduciaries who cause loss to a plan. By specifying the types of relief available against fiduciaries under Section 409, Congress established a floor of relief for specific cases, irrespective of the relief available under the federal common law.

The provision of relief against fiduciaries under Section 409(a), however, does not mean that Congress intended to preclude courts from awarding similar remedies against non-fiduciaries under Section 502(a)(3). In Section 502(a)(3), Congress gave the courts the authority to determine the type and scope of equitable relief necessary to effectuate ERISA's purposes. *See Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 486 (1990). Thus, in appropriate situations, the federal common law may provide for relief that meets the floor of specified remedies under Section 409(a). This construction of ERISA Sections 502(a)(3) and 409(a) allows both provisions to coexist, consistent with the principle of giving effect to all of a statute's provisions. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

II. OBRA'S CREATION OF A CIVIL PENALTY AGAINST NON-FIDUCIARIES WHO KNOWINGLY PARTICIPATE IN A BREACH OF TRUST MAKES CLEAR THAT COURTS MAY ASSESS PENALTIES AGAINST SUCH NON-FIDUCIARIES.

In 1989, Congress enacted the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 2101, 103 Stat. 123, which among other provisions, added a new Section 502(*l*), 29 U.S.C. § 1132(*l*) to ERISA. Section 502(*l*) provides that

> In the case of (A) any breach of fiduciary responsibility under (or other violation of) part four by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

ERISA § 502(*l*)(1), 29 U.S.C. § 1121(*l*)(1) (emphasis added).

The term "applicable recovery amount," in turn, is defined as

> . . . any amount which is recovered from a fiduciary *or other person* with respect to a breach or violation described in paragraph (1)—pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary *or other person* to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

ERISA § 502(*l*)(2), 29 U.S.C. § 1132(*l*)(2) (emphasis added).

Thus, Section 502(l) imposes an award of civil penalties when the Secretary recovers damages under Section 502(a)(5), 29 U.S.C. § 1132(a)(5). Section 502(a)(5) authorizes the Secretary to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter." Thus, Congress premised the civil penalty under Section 502(*l*) on the existing availability of money damages as a form of "equitable relief" against a person who knowingly participated in a fiduciary's breach of trust.[4]

[4] In 1989, four of the five circuits that had considered the issue had held that a participant could bring a civil action for money damages against a person who knowingly participated in a fidu-

In the case now before the Court, the court of appeals rejected this apparent confirmation of the statute's reach. The court of appeals held that Section 502(*l*) "applies to the Secretary only, not to plan participants." (J.A. 43.) Based on this construction, the court below reasoned that only the Secretary may obtain make-whole relief against a non-fiduciary.

Section 502(*l*), however, did not, as the court of appeals apparently believes, create a new civil remedy under which the Secretary could obtain monetary relief for damages to the plan. Rather, it tacked on a civil penalty to damages already recoverable by the Secretary under Section 502(a)(5), which was not amended. Since the relevant language of Sections 502(a)(5) and (a)(3) is identical, the inescapable conclusion is that Section 502(a)(3) also authorizes make-whole relief that would have been granted by a court of equity. *See Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2596 (1992) ("identical terms within an Act bear the same meaning.")[5]

ciary's breach of duty. *Whitfield v. Lindemann*, 853 F.2d 1298 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982). Another circuit suggested in dictum its agreement. *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985). Moreover, most district courts that had considered the issue without the benefit of guidance from a court of appeals also agreed. *See* note 1, *infra*.

[5] The court of appeals also reasoned that Congress failed to expressly overrule its earlier holding in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) when Congress enacted Section 502(*l*). But *Nieto* and Section 502(*l*) cannot coexist. ERISA Section 502(*l*) could not be given effect against non-fiduciaries unless Section 502(a)(3)'s grant of equitable relief permitted a finding of liability against a person who knowingly participates in a fiduciary breach. The Ninth Circuit's view that Congress acquiesced by not explicitly

III. RECOGNITION OF A REMEDY AGAINST A NON-FIDUCIARY IS CONSISTENT WITH THIS COURT'S HOLDING IN *MASSACHUSETTS MUTUAL INSURANCE CO. v. RUSSELL*.

The court of appeals in the instant case and in *Nieto* opined that granting relief against a person for knowing participation in a fiduciary breach would violate this Court's holding in *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134, 145-146 (1985). In *Russell*, this Court rejected an invitation to find a private right of action for extra-contractual damages implied in ERISA. The Court observed that

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.

Russell, 473 U.S. at 146 (emphasis in original).

Russell makes clear that the federal courts will not imply remedies that Congress did not expressly include in Section 502(a). Petitioners in this case have not, however, asked this or any other court to imply a remedy that Congress did not include in the statute. Section 502(a)(3) expressly provides for "equitable relief," which traditionally has included damages for knowing participation in a fiduciary's breach. Certainly it is within the authority that Congress granted to the federal courts to find that such a remedy remains an appropriate form of "equitable relief" under ERISA.

rejecting its holding in *Nieto* is thus seriously misguided. *See* H.R. Rep. No. 247, 101st Cong., 1st Sess. 77-78, *reprinted in* 1989 U.S. Code Cong. & Admin. News, 1906, 1969-1970.

CONCLUSION

For the foregoing reasons, AARP respectfully asks the Court to reverse the holding of the court below and to find that non-fiduciaries are liable under ERISA for knowing participation in a fiduciary breach.

Respectfully submitted,

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(7)

No. 91-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM J. MERTENS, *et al.*,
Petitioners,

v.

HEWITT ASSOCIATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

The American Academy of Actuaries submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of respondent in No. 91-1671, having obtained the written consent of both the petitioners and the respondent to do so. Said written consent accompanies this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Academy of Actuaries (the "Academy") is a nonprofit professional association established in 1965 to provide a common membership organization for actuaries of all specialties (including pension and health) prac-

ticing within the United States, and to seek greater public recognition for the actuarial profession. To become an Academy member, an actuary must satisfy rigorous education and experience requirements. Membership in the Academy is a requirement in many states to perform certain types of actuarial work. The Academy's primary activities include: the promulgation and implementation of standards of professional conduct, practice and qualification; liaison with federal and state governments; relations with other professions; and dissemination of public information about the actuarial profession. The Academy's membership exceeds 11,000 actuaries nationwide.

The Academy maintains a Code of Professional Conduct to govern the professional ethics of its members;[1] the Code is administered by the Actuarial Board of Counseling and Discipline (the "ABCD"). The ABCD is an independent body created to maintain a high quality of actuarial practice. The Academy and four other United States actuarial organizations have delegated to the ABCD responsibility to investigate complaints against their members, and to counsel their members concerning the application of standards of practice, conduct and qualification to their professional activities. The ABCD is also authorized to recommend to the Academy and other organizations that public discipline in the form of reprimand, suspension or expulsion from membership be taken against actuaries who are members of these organizations where serious violations have occurred.

To be eligible to provide actuarial services to employee benefit plans governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.*, actuaries must be licensed by the Joint Board for the Enrollment of Actuaries ("the Joint Board"), an institution maintained by the United States Department

[1] The Academy's Code of Professional Conduct is reproduced in the Appendix to this brief.

of the Treasury and the United States Department of Labor. Approximately ninety percent of the "enrolled actuaries" in the United States are members of the Academy, and are subject to oversight by both the Joint Board and the Academy. These actuaries work closely with plan fiduciaries, and the Court's decision in this case is likely to have a significant effect upon their professional activities. Accordingly, the Academy and its members have a substantial interest in this proceeding.

SUMMARY OF ARGUMENT

The imposition of fiduciary duty upon non-fiduciaries serving employee benefit plans would be inconsistent with the express language of ERISA and contrary to Congressional intent. The statute does not provide for such a cause of action, and Congress has specifically declined to amend ERISA to impose liability upon non-fiduciaries for knowing participation in breaches of fiduciary duty. Given the evident care with which the enforcement scheme of ERISA was crafted, it must be presumed that Congress' refusal to amend that scheme was intentional. The Court should not construe ERISA to provide for a cause of action that Congress has specifically considered and rejected. Further, the interpretation of ERISA urged by the petitioners would render meaningless ERISA's carefully-crafted definition of "fiduciary," making fiduciaries and non-fiduciaries almost identically liable despite the significant differences in their levels of responsibility for administration of plan assets. The plain language of ERISA limits to a specific civil penalty, imposed only in suits brought by the Secretary of Labor, the liability of non-fiduciaries who knowingly participate in breaches of fiduciary duty. No greater liability should be implied.

Moreover, there currently exist significant restraints to prevent actuaries and other non-fiduciaries working under ERISA from knowingly participating in a fiduciary breach. The civil penalty imposed by Section 502(*l*)

of ERISA is a deterrent to would-be participants in fiduciary breaches, as are ERISA's prohibition of party-in-interest transactions and the risk of suit to obtain the equitable remedies available under the statute. An enrolled actuary practicing under ERISA faces substantial penalties, including the possible loss of enrollment status, for failure properly to discharge his or her statutory responsibilities under ERISA. An actuary who is an Academy member and fails to perform professional duties under ERISA in accordance with applicable standards of practice and conduct may be disciplined by, and even expelled from, the Academy. Thus, it is not necessary to manufacture a cause of action in this suit to protect the interests of ERISA plan participants.

However, even if the Court finds that a cause of action for knowing participation in a breach of fiduciary duty should be read into ERISA in some circumstances, the elements of such a cause of action have not been articulated here. All of the petitioners' allegations against the defendant actuarial firm involve only the setting of actuarial assumptions that may not have adequately reflected changes in circumstances surrounding the plan. The setting of actuarial assumptions has not traditionally been regarded by the courts as fiduciary activity under ERISA, because it does not involve discretionary administration of the plan or its assets. Thus, the mere allegation that actuarial assumptions were set improperly is not sufficient to establish a breach of fiduciary duty in which the actuaries could have participated. Moreover, the respondent actuaries have been accused of *knowing* participation in a fiduciary breach. The setting of actuarial assumptions has not been regarded by the courts as fiduciary activity and, therefore, the actuaries in this case cannot be charged with knowledge that the setting of allegedly inaccurate actuarial assumptions would constitute a fiduciary breach or participation therein.

Professionals who render services to employee benefit plans generally lack fiduciary discretion to administer

plans, are not involved in the management or disposition of plan assets, and should not be held responsible for a fiduciary's abuse of that discretion. A professional who fails to perform services in an appropriate manner should be subject to existing penalties that do not involve fiduciary liability. The Court is urged not to impose upon non-fiduciaries a level of liability that is disproportionate to their authority.

ARGUMENT

I. IMPOSITION OF FIDUCIARY DUTY UPON NON-FIDUCIARIES WOULD BE INCONSISTENT WITH ERISA

A. Congress Has Considered And Rejected Petitioners' Proposed Cause Of Action

The stated purpose of ERISA is to "protect . . . the interests of participants in employee benefit plans and their beneficiaries," in part "by establishing standards of conduct, responsibility, and obligation for *fiduciaries of employee benefit plans* . . . ." 29 U.S.C. § 1001(b) (emphasis added). As this Court has recognized, "ERISA is a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981), *quoting Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). In order to achieve ERISA's objectives, Congress carefully crafted into the statute what the Court has characterized as an "interlocking, interrelated and interdependent remedial scheme" consisting of "six carefully integrated enforcement provisions." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985). However, the petitioners in this case invite the Court to read into ERISA a cause of action against non-fiduciaries that is not expressly included in the statute's enumerated remedies. The Court in *Russell* refused to add to ERISA's enforcement provisions a cause of action not expressly articulated in the statute, *id.* at 148, and is urged to decline petitioners' invitation here.

When enacting ERISA, Congress expressed its intent to make applicable to ERISA fiduciaries " 'certain principles developed in the evolution of the law of trusts.' " *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1988), *quoting* H.R. Rep. No. 533, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4649. The legislative history of ERISA indicates that Congress intended to "apply rules and remedies similar to those under traditional trust law to govern *the conduct of fiduciaries*." H.R. Rep. No. 1280, 93d Cong., 2d Sess. 2, *reprinted in* III Legislative History of the Employee Retirement Income Security Act of 1974 at 4277, 4562 (1974) (emphasis added). This is not to say, however, that Congress intended to apply those principles with equal force to non-fiduciaries, or that ERISA was intended to be nothing more than a codification of the common law of trusts. To the contrary, Congress recognized that "reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries." H.R. Rep. No. 533, *supra*, 1974 U.S. Code Cong. & Admin. News at 4650. For that reason, when Congress drafted ERISA "[t]he principles of fiduciary conduct [were] adopted from existing trust law, but with modifications appropriate for employee benefit plans." *Id.*, 1974 U.S. Code Cong. & Admin. News at 4643. It is entirely reasonable to presume that these "appropriate modifications" included statutory remedies that were not identical to those available under common law, but that appeared more appropriate to fulfill Congress' legislative purposes.

Indeed, Congress has considered and rejected an amendment to ERISA that would have explicitly provided for the cause of action that the petitioners seek to read into the statute in this case. In 1989, Congress considered whether to amend ERISA through the Omnibus Budget Reconciliation Act to specifically state that non-fiduciaries are liable for knowing participation in a breach of fiduciary duty, in order to resolve the difference of opinion

on the subject that had arisen between the United States Courts of Appeal in several federal circuits. *See* H.R. Rep. No. 3299, 101st Cong., 1st Sess. § 3151(e)(6), *reprinted in* 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). The proposed amendment was rejected, and Congress amended ERISA to direct the Secretary of Labor to impose upon non-fiduciaries who knowingly participate in a breach of fiduciary duty a civil penalty of twenty percent of the "applicable recovery amount." *See* 29 U.S.C. § 1132(l) (Supp. II 1990).[2]

Thus, the petitioners do not simply ask the Court to read into ERISA a cause of action that is not expressly included in the statute; they ask the Court to find that the statute implicitly includes a cause of action that Congress has specifically rejected. Petitioners claim that Congress' failure to adopt the proposed amendment is not persuasive "because ' "several equally tenable inferences" ' may be drawn" from Congress' action. Petitioners' Brief at 17, *quoting Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990) and *United States v. Wise*, 370 U.S. 405, 411 (1962). However, as the Court has stated, Congress' rejection of a proposed amendment "strongly mitigates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 201 (1974).

[2] Petitioners argue that no recovery could be had against non-fiduciaries under 29 U.S.C. § 1132(l) unless ERISA "already encompassed monetary relief from non-fiduciaries" because the penalty assessed under 29 U.S.C. § 1132(l) is a percentage of a "recovery amount" that must be a sum to be recovered from the non-fiduciary. Petitioners' Brief at 15. This argument ignores the possibility that the "recovery amount" could be the amount recovered from the fiduciary for a breach of fiduciary duty, or could represent an amount recovered from a non-fiduciary who participated in a prohibited transaction as a party-in-interest under 29 U.S.C. § 1106. Indeed, Section 1132(l)(4) provides for a reduction in the penalty for any taxes or penalties paid under the prohibited transaction provisions.

Given the "evident care" with which the enforcement scheme of ERISA was crafted, *Russell, supra*, at 147, it must be presumed that Congress' refusal to amend that scheme was intentional. The Court has already declined to infer that Congress intended to authorize other remedies "that it simply forgot to incorporate expressly." *Id.* at 146. The only available evidence indicates that Congress not only did not "forget" to authorize the remedy sought, but deliberately chose to impose upon non-fiduciaries who knowingly participate in a breach of fiduciary duty a specific, mandatory civil penalty, instead of adopting a common law cause of action that would merely duplicate a claim that may be brought under ERISA against the breaching fiduciary. *Cf.* 29 U.S.C. § 1109(a). The Academy urges the Court not to graft onto ERISA a remedy that Congress declined to adopt.[3]

B. Petitioners' Proposed Cause of Action Is Inconsistent With ERISA's Definition Of Fiduciary Duty

Petitioners' efforts to impose liability upon non-fiduciaries for participation in an alleged breach of fiduciary duty would effectively eliminate the clear distinction between fiduciaries and non-fiduciaries drawn by Congress when ERISA was enacted. Under the statute, an individual is a fiduciary

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

[3] *Amicus curiae* American Association of Retired Persons argues that the relief sought by petitioners is consistent with *Russell* because it is "equitable relief" within the meaning of 29 U.S.C. § 1132(a)(3). The Court unquestionably has authority to "develop a federal common law of rights and obligations under ERISA-regulated plans." *Firestone, supra, quoting Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). However, the Academy believes it would be an abuse of the Court's authority to read into the phrase "equitable relief" a cause of action that Congress refused to adopt.

29 U.S.C. § 1002(21)(A). Unlike a party who merely provides ministerial services or advice (other than investment advice) to a plan, a fiduciary has substantial responsibility, and owes the plan a significant duty of care. The fiduciary must discharge his or her duties in the interests of the participants and beneficiaries, and must administer the plan and its assets with the same prudence that the trustee would use in his or her personal business affairs. 29 U.S.C. § 1104(1)(A). The fiduciary must diversify the plan's investments to minimize large losses, 29 U.S.C. § 1104(1)(C), and must function in accordance with plan documents to the extent they are consistent with ERISA. 29 U.S.C. § 1104(1)(D). The fiduciary must not involve the plan in a transaction that the fiduciary knows or should have known would be a prohibited party-in-interest transaction, 29 U.S.C. § 1106. Moreover, a fiduciary who "participates knowingly in . . . an act or omission of [another] fiduciary, knowing such act or omission is a breach" may be held jointly and severally liable for such breach. 29 U.S.C. § 1105. ERISA imposes no such requirements or liability upon non-fiduciaries.

Recognizing the importance of the special responsibilities imposed upon the fiduciary by ERISA, Congress has imposed special liability upon a fiduciary who fails to satisfy statutory requirements. A fiduciary who breaches his or her statutory duties faces specific, personal liability for any losses sustained by the plan, is required to disgorge any profits garnered through use of plan assets, and is subject to other appropriate "equitable or remedial

relief . . . including the removal of such fiduciary." 29 U.S.C. § 1109(a). No similar liability is expressly imposed upon non-fiduciaries.

In crafting ERISA, Congress clearly focused upon fiduciaries, and sought to impose special liability upon them commensurate with the special responsibilities a fiduciary bears. The lesser civil penalty imposed by 29 U.S.C. § 1132(*l*) is consistent with Congress' recognition of the lesser responsibilities of non-fiduciaries under ERISA. To impose identical liability upon non-fiduciaries for participation in a fiduciary breach would weaken the distinction between fiduciaries and non-fiduciaries established by Congress, and could thereby lessen fiduciaries' appreciation of the magnitude of their personal responsibilities to ERISA plans. Such a result would conflict with ERISA's language and Congress' legislative objectives.

II. ADEQUATE PROTECTION FOR PLAN PARTICIPANTS AND BENEFICIARIES EXISTS WITHOUT IMPOSING FIDUCIARY DUTY UPON NON-FIDUCIARIES

Contrary to petitioners' assertions, the imposition of fiduciary responsibility upon non-fiduciaries is not necessary to protect the interests of plan participants and beneficiaries. The civil penalty imposed upon non-fiduciaries by 29 U.S.C. § 1132(*l*) for knowing participation in a fiduciary breach is a "substantial monetary sanction[]," Petitioners' Brief at 14, and should serve as a powerful deterrent to prevent non-fiduciaries from participating in a fiduciary's breach of duty. Moreover, to the extent that a non-fiduciary is also a party in interest, ERISA specifically prohibits that party from entering into transactions with the plan from which the non-fiduciary would take unjust enrichment. 29 U.S.C. § 1106. The equitable remedies provided by 29 U.S.C. § 1132(3)(B) may also be available against a non-fiduciary to remedy a violation of ERISA. For example, if an actuary deliberately selected unreasonable assumptions, a court could order the actuary to cease using

those assumptions, and to substitute assumptions that would result in full funding of the plan.

Actuaries who serve plans governed by ERISA face additional significant deterrents to misconduct. To perform services under ERISA, an actuary must be approved by the Joint Board for the Enrollment of Actuaries. 20 C.F.R. § 901.2(a). Actuaries who are enrolled by the Joint Board are specifically required by federal regulation to perform actuarial work under ERISA with due skill, care, prudence and diligence. 20 C.F.R. § 901.20(e). The enrolled actuary must disclose any conflict of interest to the plan trustees, any named fiduciary of the plan, the plan administrator, and the collective bargaining representative, if any. 20 C.F.R. § 901.20(d). The enrolled actuary must also decline to perform professional services if the actuary believes that his or her services may be used in a manner that is fraudulent or inconsistent with law. 20 C.F.R. § 901.20(b). Failure to discharge these regulatory obligations may be grounds for the actuary's enrollment status to be suspended or terminated. 20 C.F.R. § 901.31(b). Loss of enrollment status is deemed to be so serious that the Internal Revenue Service has proposed that enrolled actuaries who lose their enrollment status be suspended from practice before the Internal Revenue Service on an expedited basis. *See* Notice of Proposed Rule Making, *Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service*, 57 Fed. Reg. 46356, 46360 (Oct. 8, 1992).

The Academy's Code of Professional Conduct also prohibits its members from engaging in misconduct. Precept 2 of the Code requires Academy members to "perform professional services with integrity, skill and care." Precept 8 of the Code prohibits members from performing professional services involving a conflict of interest unless the actuary's ability to act fairly is unimpaired, there

has been full disclosure of the conflict, and all direct users have expressly agreed to the performance of the services by the actuary. Precept 9 of the Code prohibits a member from performing services if the member has reason to believe those services "may be used to violate or to evade the law." Departure from the Code of Professional Conduct could bring an Academy member before the ABCD and, if the member's failure to comply with the Code was sufficiently severe, could lead to public reprimand, or suspension or expulsion from membership. The Academy believes it unlikely that its members, who regard themselves as highly skilled professionals, would lightly risk the public disgrace of being expelled from the Academy for failure to comply with their ethical responsibilities.

Thus, an actuary providing services to an employee benefit plan governed by ERISA already has substantial reason to avoid intentional misconduct. The Court need not read into ERISA a cause of action not expressly provided by the statute to protect plan participants and beneficiaries from the unlikely occurrence that an actuary will risk a substantial civil penalty and imposition of equitable remedies, as well as possible loss of enrollment status, authorization to practice before the Internal Revenue Service, and Academy membership to knowingly participate in a fiduciary's breach of statutory duty.[4]

III. NO LEGALLY-COGNIZABLE BREACH OF FIDUCIARY DUTY HAS BEEN ALLEGED

Although petitioners presume that respondent has knowingly participated in a breach of fiduciary duty, the nature of the alleged breach has never been specifically

[4] Many actuaries maintain errors and omissions insurance to protect them from the consequences of any inadvertent errors in their professional practice. Knowing participation in a breach of fiduciary duty typically would be excluded from coverage under these policies, while the breaching fiduciary is likely to be covered by fiduciary insurance or indemnified by the employer for the breach.

articulated. Petitioners have simply asserted that respondent "'delegated the responsibility for selecting actuarial assumptions to Kaiser.'" *Petitioner's Brief* at 6, *quoting Mertens v. Hewitt Associates*, 948 F.2d 607 (9th Cir. 1991). It is by no means clear that the setting of actuarial assumptions, taken alone, constitutes "fiduciary activity" for purposes of ERISA.[5]

As the Court has recognized, "[a] fair contextual reading of [ERISA] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets . . ." when determining what constitutes "fiduciary activity". *Russell, supra*, 473 U.S. at 142-43. Courts have generally agreed that the performance of functions not involving discretionary management of plan assets does not implicate ERISA's fiduciary duty provisions, even if the individuals involved have some responsibility for plan administration. *See, e.g., Anoka Orthopaedic Associates, P.A. v. Lechner*, 910 F.2d 514 (8th Cir. 1990) (attorney and accountants who performed ministerial tasks for plan not ERISA fiduciaries); *Richardson v. U.S. News & World Report*, 623 F. Supp. 350, 352 (D.D.C. 1985) and cases cited therein (trustee performing wholly non-discretionary functions is not ERISA fiduciary). *See also* 29 C.F.R. § 2509.75-8 at D-2 (statement of the Department of Labor that persons who perform ministerial functions for plans are not ERISA fiduciaries). Indeed, petitioners have not even clearly alleged that Kaiser was acting as a fiduciary when setting actuarial assumptions, rather than making a business decision to which fiduciary responsibility under ERISA would not apply. *Cf. Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159-61 (3d Cir. 1990)

[5] Petitioners' other accusations, *inter alia*, that respondent performed actuarial work for the plan sponsors at the same time as the plan without disclosing any potential conflict of interest to the plan administrators, do not implicate any wrongdoing on the part of a plan fiduciary and, therefore, cannot support a claim of participation in a fiduciary breach.

(employer that was also plan administrator did not act as fiduciary when making business decision to amend severance plan); *Local Union 2134, UMW of America v. Powhatan Fuel*, 828 F.2d 710, 713-14 (11th Cir. 1987) (corporate officer who is also fiduciary does not act as fiduciary when making business decisions for corporation).

The one court of appeals that has specifically considered whether actuarial work constitutes fiduciary activity under ERISA concluded that it does not. In *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991), the court reviewed ERISA's express language and legislative history, and ruled that Congress did not intend actuaries rendering professional services to plans to be regarded as ERISA fiduciaries. *Id.* at 535-36. The court acknowledged that an actuary could become a fiduciary by "undertak[ing] tasks that transcend the usual scope of a professional-client relationship." *Id.* at 538, *citing* 29 C.F.R. § 2509.75-5. However, the *Pappas* court specifically declined to hold that actuaries become fiduciaries by performing professional functions in a tortious manner, "regardless of what capacity they are acting in when their tortious deeds occur." *Id.* at 538. An allegation that an actuary negligently performed professional functions, without more, is not sufficient to establish that the actuary "transcended the normal role of an actuary providing advice to an ERISA plan." *Id.*[6] Given that the setting of actuarial assumptions does not involve administration of the plan or the management or disposition of plan assets, and therefore cannot be deemed to be fiduciary activity, the petitioners have failed to allege that a breach of fiduciary duty occurred in which the respondent actuaries could have participated.

[6] It should be noted that the court below specifically held that, in this case, "no inference can be made from the complaint that Hewitt acted in any capacity other than as an actuary." *Mertens, supra*, 948 F.2d at 610.

It should also be emphasized that the respondent actuaries are accused not of negligence, but of *knowing* participation in a fiduciary breach. In light of the *Pappas* court's specific ruling that the performance of actuarial services (which includes the setting of actuarial assumptions) is not fiduciary activity, the respondent actuaries would have had no reason to anticipate that the setting of actuarial assumptions as described by petitioners could lead to a fiduciary breach. The facts as alleged by the petitioners are, therefore, insufficient to establish the existence of knowing participation in this case.

An actuary providing professional services to an ERISA plan does not have direct access to or discretionary authority over the plan's assets. It would be inconsistent with the legislative emphasis of ERISA to make no distinction between those non-fiduciary actuaries and fiduciaries whose substantial authority merits commensurate liability. As we have shown, actuaries already face significant penalties for failure to perform work in a professional manner. If an actuary does not meet his professional obligations, those penalties should be imposed. Similarly, if an actuary engages in unusual activity and transcends the traditional professional role to become a fiduciary for purposes of ERISA, the higher standard of liability imposed upon fiduciaries under the statute should apply. However, actuaries and other non-fiduciaries who provide ordinary professional services to plans should not be subjected to special liability that is disproportionate to their responsibilities and authority. Under ERISA, it is ultimately the fiduciary who is, and should remain, primarily responsible for any breach of fiduciary duty.

CONCLUSION

For the foregoing reasons, the Academy respectfully requests that the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

CODE OF PROFESSIONAL CONDUCT OF THE AMERICAN ACADEMY OF ACTUARIES

Preamble

The Precepts of this Code of Professional Conduct identify the professional and ethical standards by which the actuary is expected to abide and thereby serve the public interest. The Annotations provide additional explanatory, educational and advisory material to members of the actuarial profession on how the Precepts are to be interpreted and applied. It is the professional responsibility of the actuary to be knowledgeable about the Code of Professional Conduct, and to keep current with revisions to its Precepts and Annotations.

Professional Integrity

PRECEPT 1. An actuary shall act honestly and in a manner to uphold the reputation of the actuarial profession and to fulfill the profession's responsibility to the public.

PRECEPT 2. An actuary shall perform professional services with integrity, skill and care.

> *ANNOTATION 2-1.* The term "professional services" as used in the Code of Professional Conduct refers to the rendering of advice, recommendations or opinions based upon actuarial considerations, and also includes other services provided from time to time by an actuary to a client or employer.

Qualification Standards

PRECEPT 3. An actuary shall perform professional services only when the actuary is qualified to do so and meets applicable qualification standards.

ANNOTATION 3-1. It is the professional responsibility of the actuary to observe applicable qualification standards and to keep current regarding changes in those standards. For practice in the United States, the Qualification Standards promulgated by the American Academy of Actuaries apply. For practice in Canada, the eligibility conditions promulgated by the Candian Institute of Actuaries apply.

Practice Standards

PRECEPT 4. An actuary shall ensure that professional services performed by or under the direction of the actuary meet applicable practice standards.

ANNOTATION 4-1. It is the professional responsibility of the actuary to keep current regarding generally accepted principles and standards of practice in the jurisdiction in which the actuary renders professional services. For practice in the United States, the Standards of Practice promulgated by the Actuarial Standards Board apply. For practice in Canada, the Standards of Practice promulgated by the Canadian Institute of Actuaries apply.

ANNOTATION 4-2. Where there is a question regarding the applicability of a practice standard, the professional judgment of the actuary should prevail. In any event, the actuary must be prepared to explain to peers the reasons for the determination made.

ANNOTATION 4-3. Laws and regulations may establish restraints and obligations on the part of the actuary towards designated publics. The requirements of laws and regulations are binding; but when such requirements are in conflict with practice standards, they should be identified as flowing directly from the laws and regulations and not from professional considerations.

Disclosure

PRECEPT 5. An actuary shall, in communicating professional findings, indicate clearly that the actuary is the source of the findings and is available to provide supplementary information and explanation.

ANNOTATION 5-1. An actuary who makes an actuarial communication assumes responsibility for it except to the extent the actuary disclaims responsibility by stating reliance on other sources. Reliance on other sources means making use of those sources without assuming responsibility therefor. A communication making use of any such reliance should define the extent of reliance.

ANNOTATION 5-2. Any written communication of professional findings must be signed with the name of the actuary who is responsible for it. The name of an organization with which the actuary is affiliated may be incorporated into the signature but the actuary's responsibilities and those of the organization are not affected by the form of the signature.

PRECEPT 6. An actuary shall, in communicating professional findings, identify the client or employer for which such findings are made and in what capacity the actuary serves.

PRECEPT 7. An actuary shall make full and timely disclosure to a client of the sources of all direct and indirect compensation that the actuary or the actuary's firm may receive in relation to an assignment for which the actuary provides professional services for that client.

ANNOTATION 7-1. An actuary who is not financially and organizationally independent concerning any matter related to the subject of an actuarial communication should disclose any pertinent relationship which is not apparent.

ANNOTATION 7-2. "Indirect compensation" is any consideration received from any source in relation to

an assignment for which the actuary provides professional services, other than direct billing for those services.

ANNOTATION 7-3. Actuaries employed by firms which operate in multiple sites are subject to the requirement of disclosure of sources of compensation which the actuary's firm may receive in relation to professional services with respect to a specific assignment for that client, regardless of the location in which such compensation is received.

Conflicts of Interest

PRECEPT 8. An actuary shall not perform professional services involving an actual or potential conflict of interest unless:

(a) the actuary's ability to act fairly is unimpaired and

(b) there has been full disclosure of the conflict and

(c) all direct users have expressly agreed to the performance of the services by the actuary.

ANNOTATION 8-1. An actuary has an obligation to observe standards of professional conduct whether serving as a consultant or employee. A client or employer is the direct user of the actuary's services when the direct user has the opportunity to select the actuary and is in a position to communicate directly with the actuary about qualifications, work and recommendations.

ANNOTATION 8-2. If the actuary is aware of any significant conflict between the interests of the client or employer and the interests of another party, the actuary should advise the client or employer of the conflict and should, if appropriate, include qualifications or disclosures in any related actuarial communication.

ANNOTATION 8-3. An actuary shall not use a relationship with a third party to obtain unduly favorable treatment from such third party on behalf of a client or employer.

Control of Work Product

PRECEPT 9. An actuary shall not perform professional services when the actuary has reason to believe that they may be used to violate or to evade the law.

ANNOTATION 9-1. Material prepared by an actuary may be used by another party in a way which may influence the actions of a third party. The actuary should recognize the risks of misquotation, misinterpretation or other misuse of such material and should take reasonable steps to ensure that the material is clear and presented fairly and that the actuary is identified as the source of the material.

PRECEPT 10. An actuary shall not disclose to another party any confidential information obtained through a professional assignment performed for a client or employer unless authorized to do so by the client or employer or required to do so by law.

ANNOTATION 10-1. The term "confidential information" as used in the Code of Professional Conduct refers to information not in the public domain of which the actuary becomes aware during the course of rendering professional services to a client or employer. It may include information of a proprietary nature, information which is legally restricted from circulation, or information which the actuary has reason to believe that the client or employer would not wish to be divulged.

Courtesy and Cooperation

PRECEPT 11. An actuary shall perform professional services with courtesy and shall cooperate with others in the client's or employer's interest.

ANNOTATION 11-1. Differences of opinion among actuaries may arise particularly in choices of assumptions and methods. Discussion of such differences, whether directly between actuaries or in observations made to a client by one actuary on the work of another, should be conducted objectively and with courtesy.

ANNOTATION 11-2. An actuary in the course of employment or an engagement may encounter a situation such that the best interest of the employer or client would be served by the actuary's setting out an alternative opinion to one expressed by another actuary together with an explanation of the factors which lend support to the alternative opinion. Nothing in the Code of Professional Conduct should be construed as preventing the actuary from expressing such an alternative opinion to the client or employer.

ANNOTATION 11-3. A principal (any present or prospective employer) has an indisputable right to choose a professional advisor. An actuary may provide service to any principal who requests it even though such principal is being or has been served by another actuary in the same matter.

If an actuary is invited to advise a principal for whom the actuary knows or has reasonable grounds to believe that another actuary is already acting in a professional capacity with respect to the same matter or has recently so acted, it may be prudent to consult the other actuary both to prepare adequately for the assignment and to make an informed judgement whether there are circumstances as to potential violations of the Code of Professional Conduct which might affect acceptance of the assignment.

The prospective new or additional actuary should request the principal's consent to such consultation. When the principal has given consent, the original actuary may require reasonable compensation for the

work required to assemble and transmit the relevant information such as pertinent data, work papers and documents. The actuary need not include any items of a proprietary nature, such as computer programs.

Advertising

PRECEPT 12. An actuary shall not engage in any advertising or business solicitation activities in respect of professional services that the actuary knows or should know are false or misleading.

ANNOTATION 12-1. The term "advertising" as used in the Code of Professional Conduct encompasses all communications by whatever medium, including oral communications, which may directly or indirectly influence any person or organization to decide whether there is a need for actuarial services or to select a specific person or firm to perform actuarial services. The intent is to discourage advertising which contains any statements or claims which are in any material respect false, fraudulent, misleading or deceptive.

Titles and Designations

PRECEPT 13. An actuary shall make use of those membership titles and designations of an actuarial organization only where that use conforms to the practices authorized by that organization.

ANNOTATION 13-1. The term "title" as used in the Code of Professional Conduct means any title conferred by an actuarial organization related to a specific position within that organization. The term "designation" means a specific reference to membership status within an actuarial organization.

Collateral Obligations

PRECEPT 14. An actuary shall be deemed to have contravened the Code of Professional Conduct and shall

be subject to the profession's disciplinary procedures if the actuary pleads or is found guilty of any misdemeanor related to financial matters or any felony.

PRECEPT 15. An actuary with knowledge of a material violation of this Code shall disclose such suspected violation to the appropriate counseling and discipline body of the profession, except where the disclosure would divulge confidential information or be contrary to law.

> *ANNOTATION 15-1.* For violations of this Code arising in the United States, the actuary should refer the matter to the Actuarial Board for Counseling and Discipline. For violations of this Code arising in Canada, the actuary should follow procedures established by the Canadian Institute of Actuaries.
>
> *ANNOTATION 15-2.* A material violation of this Code is one which is important, has influence or effect, or impacts on the merits of a situation, as opposed to one which is trivial, does not affect an outcome, or is one merely of form.
>
> *ANNOTATION 15-3.* Disclosure of a fellow professional's material violation of this Code may be a matter of law as well as ethics. An actuary faced with a decision whether or not to disclose the violation should consider seeking legal counsel; action may bring the possibility of a defamation suit; inaction may bring civil charges or charges of professional misconduct.

PRECEPT 16. An actuary or representative shall respond promptly in writing to any letter received from a person duly authorized by the appropriate counseling and disciplinary body of the profession to obtain information or assistance regarding possible violations of this Code.

No. 91-1671

In The
Supreme Court of the United States

October Term, 1992

William J. Mertens, Alex W. Bandrowski,
James A. Clarke, and Russell Franz,
Petitioners,
v.

Hewitt Associates,
an Illinois Partnership,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF RESPONDENT

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IN THE

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No. 91-1671

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ, *Petitioners,*

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BRIEF *AMICUS CURIAE* OF AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF RESPONDENT

INTRODUCTION

The American Society of Pension Actuaries ("ASPA") submits this brief *amicus curiae* to urge the Court to affirm the holding below that the Employee Retirement Income Security Act ("ERISA") provides no private cause of action for money damages against a nonfiduciary, generally, and against an actuary, in particular.

INTEREST OF ASPA

ASPA is a nonprofit organization whose purpose is to educate pension plan professionals and to preserve and enhance the private pension system. For example, ASPA sponsors numerous educational programs and is a cospon-

sor of the examinations of the Joint Board for the Enrollment of Actuaries, which a candidate must pass in order to attain Enrolled Actuary status.[1] ASPA recently participated as an *amicus curiae* in *Patterson v. Shumate*, 504 U.S. ——, 119 L.Ed. 2d 519 (1992), in support of the position ultimately upheld by this Court.

The membership of ASPA consists of nearly 3,000 individuals who provide actuarial, consulting, and administrative services to approximately 30% of the tax-qualified retirement plans in the United States. The members of ASPA, like the pension plans they serve, are located throughout the United States. These plans are representative of all of the nation's tax-qualified retirement plans, which cover tens of millions of American workers.

Because of the broad range of experience of ASPA's constituency, ASPA believes that it is uniquely qualified to state the position of actuaries and their fellow professionals who provide services to the hundreds of thousands of fiduciaries charged with operating retirement plans and to the hundreds of thousands of large and small businesses that maintain these plans.

Congress, familiar with the way in which employee benefit plans operate, enacted ERISA in order to ensure "the continued well-being and security of millions of employees and their dependents . . . directly affected by [employee benefit] plans," 29 U.S.C. § 1001(a). To accomplish this end, Congress established a detailed list of causes of action and a panoply of remedies—none of which provides for a private cause of action for money damages against a nonfiduciary. As a national representative of those nonfiduciaries who provide services to employee benefit plans, ASPA submits that reversal of the decision below would serve only to escalate the costs

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[1] ASPA's work has been instrumental in redesigning the examinations offered by the Joint Board for the Enrollment of Actuaries. *See* Proposed JEBA Reg. Part 901, Enrolled Actuary Examinations (Fed. Reg. Feb. 28, 1983).

of maintaining and administering plans, rather than achieving any goal established by the Congress.

SUMMARY OF REASONS FOR AFFIRMANCE

In fashioning ERISA, Congress chose to differentiate between fiduciaries and nonfiduciaries. Congress established detailed standards of fiduciary conduct. Congress expressly chose to provide a private cause of action for money damages against fiduciaries for their own breaches, as well as a private cause of action for money damages against fiduciaries who participate in the breaches of their cofiduciaries.

The drafters of ERISA considered whether to include actuaries within the definition of fiduciary, thereby subjecting actuaries to ERISA's fiduciary standards and exposing them to claims for money damages, if they failed to meet those standards. As reflected in the plain language of ERISA—as well as its legislative history and implementing regulations—the statute forged from the Congressional deliberations does not include actuaries within the definition of fiduciary or within the category of those against whom money damages can be obtained. On the other hand, ERISA does establish detailed duties for actuaries and it provides for the establishment of the Joint Board for the Enrollment of Actuaries to set and maintain standards for the ãctuarial professional. Moreover, ERISA does include, in detail, the obligations of actuaries (and other parties in interest). And, ERISA does include (1) a private cause of action for equitable relief against parties in interest (including actuaries) and (2) a governmental right to impose an excise tax on parties in interest (including actuaries) who engage in transactions prohibited by the statute.

Inasmuch as Congress chose not to measure the actions of actuaries under ERISA's fiduciary provisions, and Congress chose not to legislate a private cause of action for money damages against actuaries, we respectfully

submit that this Court should not choose to do so, either. *See, e.g., Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985) (ERISA held not to provide a cause of action for extracontractual damages); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 546 (1984) (Investment Company Act of 1940 held not to provide "unmentioned" intracorporate procedural prerequisite to filing complaint).

REASONS FOR AFFIRMANCE

I. CONGRESS DISTINGUISHED BETWEEN THE STANDARDS OF CONDUCT OF FIDUCIARIES AND ACTUARIES.

Congress recognized that one step in the process of those who select the funding methods and assumptions meet high professional standards. "The Secretary is . . . authorized to establish standards and qualifications for actuaries. This is a major innovation and indispensable to the effective enforcement of the funding standards and operation of the plan termination insurance program. The Committee is unaware of any significant licensing procedures for actuaries at either the state o[r] federal level. . . ." S. Rep. No. 127, 93rd Cong., 1st Sess. at 17 (1973), *reprinted in* I *Legislative History of the Employee Retirement Income Security Act of 1974* at 17 (1976) (hereinafter referred to as "*Legis. Hist.*"). Congress also stressed uniform standards for the qualification of actuaries:

> [T]he Committee bill . . . provides that the Secretary of the Treasury is to establish qualifications for actuaries and is to certify for practice before the Internal Revenue Service the persons who meet these standards. For purposes of such certification, examination may not be needed for individuals who have demonstrated sufficient pension experience or satisfactory performance in a rigorous examination system maintained by professional societies.

Id. at 24, *reprinted in* I *Legis. Hist.* at 1092. *See* S. Rep. No. 127, 93d Cong., 1st Sess. at 57, *reprinted in* I *Legis. Hist.* at 1125.

The importance of well-trained actuaries to the policy goals of ERISA was a recurring theme for ERISA's drafters:

> [T]here is no existing government regulation of the actuarial profession as there is, for example, for lawyers and accountants. To resolve this problem, the committee's bill provides that the Secretary of the Treasury is to establish rules and regulations for actuaries to practice before the Internal Revenue Service and is to enroll persons who meet the standards of competence for practice before the Service (with regard to actuarial matters only).

Id. at 68, *reprinted in* I *Legis. Hist.* at 1136. *See* H. Rep. No. 779, 93d Cong., 2d Sess. at 91-92 (1974) *reprinted in* II *Legis. Hist.* at 2680-81.

ERISA, at Section 3042, "reflects Congress' determination that only competent actuaries should be permitted to service private pension plans. To this end, Congress directed the Secretaries of Labor and the Treasury to establish a Joint Board that would superintend a process of certifying actuaries for competence." *Tabor v. Joint Board for Enrollment of Actuaries*, 556 F.2d 705, 707 (D.C. Cir. 1977). The Joint Board for the Enrollment of Actuaries, established under ERISA Section 3041, is composed of three members appointed by the Secretary of the Treasury and two appointed by the Secretary of Labor. 20 C.F.R. § 900.3 (1991). ERISA Section 3042(b) provides that the Joint Board may (after notice and an opportunity for a hearing) suspend or terminate the enrollment of an individual who fails to discharge his/her duties or does not satisfy the requirements for enrollment. Under ERISA, only enrolled actuaries can determine plan funding methods and assumptions for defined benefit pension plans; only an enrolled actuary can prepare the actu-

arial statement that must be filed annually with the Secretary of Labor for defined benefit pension plans. *See* ERISA § 103(a)(4)(A).

At one point in the Congressional debate, consideration was given to imposing fiduciary duties on enrolled actuaries:

> The assumptions utilized in determining plan liabilities and assets and the choice of appropriate funding methodology are crucial to adequate funding of a plan. The actuaries performing these plan services will fall within the definition of fiduciary and will be held to the duties imposed on such individuals, including personal liability for any breach of such duties. The Committee is convinced that notwithstanding the threat of personal liability, additional constraints are necessary to establish directly the professional qualifications of those who perform these vital services. In applying the standards of qualification outlined in the bill, the Secretary should be mindful of the difficult and sometimes subjective judgments to be made by actuaries and should take care that those who qualify be prepared to perform all of the tasks that may be required of an actuary under the bill. The prior restraints imposed on actuaries in the form of enrollment by the Secretary, as well as personal liability for failure to meet their responsibilities, impose a substantial burden on the actuary. The Committee is convinced that such burden is consistent with the importance of the function performed by these fiduciaries.

(Cong. Rec. Feb. 25, 1974) (comments of Rep. Perkins), *reprinted in* II *Legis. Hist.* at 3309.

While this view of the statute was expressed by Representative Perkins, who was Chairman of the House Committee on Education and Labor, no such view appears to have been expressed by the other members of his Committee or by any of the members of the House Ways and Means Committee, which also was charged with drafting ERISA.

Notwithstanding Representative Perkins' early view, the Conference Committee Report accompanying ERISA adopted a more limited view of the duties of professionals generally, and actuaries specifically, than that contained in Representative Perkins' statement. "After the two House committees charged with drafting ERISA had consolidated their efforts and the House bill was passed, a House-Senate Conference Committee was named, which included Representative Perkins. Explaining *the same language* Representative Perkins discussed in the comments in the [Congressional] Record excerpted above, the Conference Report observed that . . . 'the ordinary functions of consultants and advisers (other than investment advisers) may not be considered as fiduciary functions. . . .' " *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 536 (7th Cir. 1991) (emphasis in original), *quoting* H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 323 (1974). The Conference Committee Report represents the final statement of the terms agreed upon by both houses of Congress, and "next to the statute itself, it is the most persuasive evidence of the Congressional intent behind the enactment of the statute." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied*, 479 U.S. 868 (1986).

Moreover, it is the language of the Conference Committee Report, not the early comments of Representative Perkins, that is reflected in the Department of Labor regulations issued shortly after the passage of ERISA. Those regulations state that actuaries, attorneys, accountants, and consultants, when "performing their usual functions will ordinarily not be considered fiduciaries. . . ." 29 C.F.R. § 2509.75-5. The judiciary has consistently upheld the proposition that these kinds of service providers to employee benefit plans are not fiduciaries. *E.g.*, *Pappas v. Buck Consultants*, 923 F.2d 531 (7th Cir. 1991); *Anoka Orthopaedic Associates, P.A. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1980); *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988).

Thus, it is clear not only that Congress chose to distinguish between the duties of fiduciaries and the duties of actuaries, but also that this distinction has been recognized by the Department of Labor and the judiciary.

II. ERISA CONTAINS NO PRIVATE CAUSE OF ACTION FOR MONEY DAMAGES AGAINST A NON-FIDUCIARY.

Claims for money damages for fiduciary breaches and for knowing participation in a fiduciary breach arise from ERISA Section 409. The plain language of that Section limits its scope to remedies against "[a]ny person who is a fiduciary." [2] This Court has highlighted the plain meaning of ERISA Section 409 and stressed the fact that Part 4 of Title I of ERISA—where Section 409 has been deliberately placed by the Congress—is entitled "Fiduciary Responsibility." *See Russell*, 473 U.S. at 140-43. Moreover, ERISA expressly addresses liability for knowing participation in a breach of a fiduciary duty. The applicable provision is ERISA Section 405 which—by its

[2] In recently reiterating the significance of the plain meaning rule of statutory construction, this Court stressed that the "plain language of ERISA is our determinant," *Patterson v. Shumate*, 504 U.S. ——, 119 L.Ed.2d 519, 526 (1992). The preference for literalism in determining the meaning of a statute is based on the established doctrine of separation of powers. The federal judiciary owes fidelity to the will of the Congress. What the Congress sets forth in the text of a statute "is considered the best evidence of the legislative intent or will. Therefore the courts are bound to give effect to the expressed intent of the legislature." 2A N.J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1991). This Court has long held that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). This is the plain meaning rule, which has been expressed in many ways, all of which mean that, if the statutory language is clear, there should be no excursions outside the statute to search for a different meaning.

terms—is limited to liability for cofiduciaries. It does not provide for liability for nonfiduciaries.

Thus, Congress addressed in detail the issues of liability for fiduciary breaches and liability for participation in fiduciary breaches. Congress cannot be said to have overlooked these issues. Although Congress did not choose to provide for the assessment of money damages against nonfiduciaries in connection with a fiduciary's violation of ERISA, Congress did expressly address the liability of nonfiduciaries, *i.e.*, parties in interest,[3] when it was drafting ERISA: "[T]he committee bill . . . imposes sanctions for prohibited transactions upon the parties in interest and fiduciaries who engage in these transactions in place of the sanctions now imposed on the employee benefit trusts. Under the bill, the parties in interest and fiduciaries who engage in a prohibited transaction are to be subject to a two-level excise tax on the amount involved in the prohibited transaction." S. Rep. No. 383, 93d Cong., 1st Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4978.

In their deliberations, the drafters of ERISA also considered the liability for violations of ERISA, where the nonfiduciary—as opposed to the fiduciary—benefitted from the violation. "The committee believes that where the party in interest and not the fiduciary benefits from the prohibited transaction, primary responsibility under the excise tax provisions should be on the party in interest and not on the fiduciary." *Id.* at 4980. Nowhere in these deliberations did Congress even hint at a private cause of action for money damages against a nonfiduciary.

These issues were also addresed in the Conference Committee Report: "The conference substitute establishes rules governing the conduct of plan fiduciaries

[3] The statutory definition of the term "party in interest" includes service providers, ERISA § 3(14)(A), (B).

under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as 'parties in interest' under the labor provisions) with respect to the plan under the tax laws (title II) . . . . The labor law provisions apply rules and remedies *similar to those under traditional trust law to govern the conduct of fiduciaries.* The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules. . . ." H. Conf. Rep. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076 (emphasis supplied). Thus, Congress differentiated between fiduciaries and nonfiduciaries and between the liabilities of each. Congress expressly recognized that the money damage remedies were to be applied to fiduciaries, not to nonfiduciaries.

"[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77, 97 (1981). This Court has recognized on numerous occasions that ERISA is such a statute. *E.g., Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

The breadth and degree of detail in ERISA has led this Court to express its reluctance "to tamper with an enforcement scheme crafted with such evident care . . .' [W]here a statute [such as ERISA] expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 147 (1985) (citations omitted). This Court has repeatedly refused to

"engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Thompson v. Thompson*, 484 U.S. 174, 187 (1988), *quoting California v. Sierra Club*, 451 U.S. 287, 297 (1981).

ERISA and its legislative history are replete with references to and consideration of the duties, responsibilities, and liabilities of parties in interest generally, and actuaries, in particular. However, Congress affirmatively chose not to saddle actuaries with the duties and concomitant liabilities of fiduciaries. ERISA Sections 502(i) and 502(l) are the monetary deterrents to parties in interest—including actuaries—that Congress chose to federalize. These Sections impose governmental sanctions on the nonfiduciaries; they do not create a private cause of action for money damages.

While the Court may have the authority to fashion "appropriate equitable relief," under ERISA Section 502 (a)(3)(B), using the principles of trust law or the concept of federal common law, this relief is limited in its application to specific causes of action. We submit that neither ERISA nor its legislative history invites the judicial creation of new causes of action. This point is driven home by the legislative history of recent amendments to ERISA, which were enacted as part of the 1989 Omnibus Budget Reconciliation Act ("OBRA"). During the Congresional deliberations that resulted in the passage of OBRA, Congress was presented with an ERISA amendment to provide for a private cause of action for money damages against a nonfiduciary who participated in a fiduciary breach. *See* H. Rep. No. 247, 101st Cong., 1st Sess., *reprinted in* 1989 U.S.C.C.A.N. 1969-70. This was referred to as the *Nieto* amendment, because its express purpose was to overrule the Ninth Circuit's holding in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), that ERISA provides no basis for such a private cause of action against nonfiduciaries. Congress refused to enact the *Nieto* amendment.

However, as part of OBRA, Congress did add Section 502(l) to ERISA, under which Section the Department of Labor was provided for the first time with the authority to assess a monetary sanction against a nonfiduciary who participates in a fiduciary breach. More importantly for the instant case, Congress recognized that it also had to use OBRA to amend ERISA Section 502(a)(6), in order to provide the Secretary of Labor with a cause of action to collect this new Section 502(l) sanction. Even though the Petitioners appear to have blurred the difference between remedies and causes of action, Congress clearly recognizes that there is a difference.[4]

Although "[a] 'cause of action' may mean one thing for one purpose and something different for another," *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933), there is no question that remedies and causes of action are two different concepts. "The law of judicial remedies concerns itself with the nature and scope of the relief to be given a plaintiff once he has followed appropriate procedure in court and has established a substantive right. The law of remedies is thus sharply distinguished from the law of substance and procedure." D.B. Dobbs, *Handbook on the Law of Remedies* at 1 (1973).

On the other hand, a cause of action is a "state of facts which would entitle a person to sustain an action and to seek a judicial remedy on his behalf." *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 971 (5th Cir. 1981). Put another way, "[a] cause of action consists of 'a single core of operative facts' which give rise

[4] In a similar vein, the legislative history of OBRA states: "It remains the intent of Congress that the courts use their power of [sic]fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well." 1989 U.S.C.C.A.N. at 3036. This legislative history does not mention the existence of any Congressional intent to have a private cause of action against nonfiduciaries for money damages. How could it, where the Congress had refused to enact the *Nieto* amendment?

to a remedy." *Alexander v. Chicago Park District*, 773 F.2d 850, 854 (7th Cir. 1985) (citation omitted). *See, e.g., Proctor v. Gissendaner*, 579 F.2d 876, 879 n.5 (5th Cir. 1978).

The instant case actually asks this Court to decide whether or not ERISA provides a particular cause of action, *i.e.*, for money damages against a nonfiduciary for participation in a fiduciary breach. When Congress considered and enacted the comprehensive, highly detailed provisions of ERISA, Congress carefully delineated the specific instances when nonfiduciaries can be liable and the remedies for and liabilities associated with those instances. Neither ERISA nor the legislative history of ERISA, nor subsequent regulations and legislation provide any support for the proposition that Congress intended to impose fiduciary duties or the concomitant liabilities on actuaries (or other nonfiduciary service providers). The legislative history of ERISA makes it clear that Congress fully considered who should be liable for what. That consideration encompassed the duties and liabilities of fiduciaries, as well nonfiduciaries, and the liabilities of those who participate in violations of ERISA.

While the legislative history of ERISA amply demonstrates a Congressional awareness of the law of trusts, that legislative history stresses that ERISA was intended to codify "certain principles"—not all the principles—of the law of trusts.[5] The more the Petitioners in the instant case argue the obviousness of a cause of action under trust law against nonfiduciaries for participating in a fiduciary breach, the more obvious is the total absence of any hint of Congressional intent-in the statute

[5] "The fiduciary responsibility section, in essence, codifies and makes applicable *to these fiduciaries certain principles developed in the evolution of the law of trusts.*" S. Rep. No. 127, 93d Cong., 1st Sess. (1973) *reprinted in* 1974 U.S.C.C.A.N. 4838, at 4865 (emphasis supplied).

or its legislative history—to permit this cause of action under federal law.

ERISA contains express private causes of action for damages (a) against a fiduciary for breaching his/her fiduciary duties and (b) against a fiduciary who participates in a breach of a cofiduciary. Those causes of actions can be asserted by plan fiduciaries; those causes of action cannot be asserted by actuaries, or by any party in interest who is not a fiduciary or a plan participant. The Department of Labor takes the position that to avoid being charged with participation in a breach of a cofiduciary, a fiduciary can sue the cofiduciary under ERISA. *See* 29 C.F.R. § 2509.75-5 at FR-10. The nonfiduciary party in interest has no standing under ERISA to bring such an action. To engraft a nonfiduciary participation in a breach theory onto ERISA would be to subject parties in interest to liability, where they lack the legal wherewithal to rectify the fiduciary breach complained of. This lack of mutuality is one more reason for this Court not to create a private cause of action that the Congress rejected.

CONCLUSION

Based on the foregoing, the American Society of Pension Actuaries respectfully urges the Court to affirm the decision below.

Respectfully submitted,

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Dated: December 1992

(9)

No. 91-1671

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI,
JAMES A. CLARKE, and RUSSELL FRANZ,
Petitioners,
v.

HEWITT ASSOCIATES,
an Illinois Partnership,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF FOR BOOKE & COMPANY; KWASHA LIPTON;
WILLIAM M. MERCER, INCORPORATED;
THE SEGAL COMPANY; TOWERS, PERRIN,
FORSTER & CROSBY, INC.; AND THE
WYATT COMPANY AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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INTEREST OF THE AMICI

Booke & Company; Kwasha Lipton; William M. Mercer, Incorporated; The Segal Company; Towers, Perrin, Forster & Crosby, Inc.; and The Wyatt Company submit this brief amici curiae, pursuant to Rule 37 of the Rules of this Court, with consent of Petitioners and Respondent.

Their letters of consent have been filed with the Clerk of Court.

The amici are consulting firms that provide professional services and support to the sponsors of employee benefit plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), on a nationwide basis. Booke & Company provides services from its headquarters in Winston-Salem, North Carolina, and other U.S. offices. Kwasha Lipton is located in Ft. Lee, New Jersey. William M. Mercer, Incorporated, is headquartered in New York, and has offices in 43 U.S. cities. The Segal Company is an international firm, with its principal office in New York, New York, and offices in fifteen other U.S. cities. Towers, Perrin, Forster, & Crosby, Inc. has its principal offices in New York, New York. The Wyatt Company provides consulting services on a worldwide basis with offices in 70 locations.

The amici's services to ERISA plan sponsors involve both actuarial and other consulting services. They advise and assist plan sponsors on such matters as plan design, actuarial valuation and cost management and projection, plan administration, computer management, testing and recordkeeping, and employee communications, for defined benefit, defined contribution, group benefit, flexible benefit, and compensation programs. The amici accordingly have very substantial experience in the provision of services to employee benefit plans of all types and are well-positioned to explain how non-fiduciary service providers work with plan sponsors under ERISA's statutory scheme.

Moreover, the amici have a significant stake in the decision of this Court. As a major part of the non-fiduciary service provider community for ERISA plans, the amici serve tens of thousands of organizations and employee benefit plans, of all sizes and in all industries, having, in aggregate, tens of millions of participants and beneficiaries.

SUMMARY OF ARGUMENT

Petitioners have asked this Court to create an ERISA cause of action under which non-fiduciary service providers can be held liable for plan losses on the ground that they "knowingly participated" in a plan fiduciary's breach of fiduciary responsibility. The short answer to this request is that Congress itself addressed the imposition of liability for "knowing participation" in a fiduciary breach in section 405(a) of ERISA, and expressly limited such exposure to plan fiduciaries. Moreover, the exclusion of non-fiduciaries from such liability was not inadvertent. Both at the time it enacted ERISA and in its 1989 amendments to the Act, Congress considered and rejected statutory provisions that would have extended liability to non-fiduciaries on knowing participation grounds.

Not surprisingly then, ERISA's civil enforcement scheme, which this Court has repeatedly recognized as "carefully-integrated," crafted with "deliberate care," "comprehensive," and "exclusive," nowhere authorizes a suit against non-fiduciaries for such liability. Section 502(a)(2) of ERISA—ERISA's basic fiduciary liability enforcement provision—cannot support such a cause of action since it permits only suits "for appropriate relief under section 409," which only imposes liability on plan fiduciaries. Thus, section 502(a)(2) is limited necessarily to actions against plan fiduciaries.

Section 502(a)(3)—the only other enforcement provision arguably relevant here—also does not authorize the expansive cause of action advocated by Petitioners. That provision permits civil actions for equitable relief to enforce ERISA's provisions or a plan's terms, or to enjoin or redress any violation of the same. However, ERISA itself *nowhere* imposes fiduciary duties on non-fiduciaries or subjects them to any liability for breach of its fiduciary responsibility provisions on a knowing participation theory.

Thus, section 502(a)(3) provides no basis for a knowing participation action against non-fiduciaries to recover plan losses occasioned by a fiduciary breach for one plain fact—there is *no* substantive provision of ERISA which non-fiduciaries can violate or which can be enforced against them in this context. As a result, the statutory prerequisite for a section 502(a)(3) action against non-fiduciaries for such liability is totally absent.

Nor can the existence of such a cause of action somehow be inferred. As this Court made clear in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985):

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.

The presumption that Congress did not intend to permit remedies beyond those expressly provided in the Act must be conclusive here given Congress' decision to expressly include a cause of action for "knowing participation" liability, but only against fiduciaries, in ERISA itself. That Congress, in enacting ERISA, considered and rejected a provision that would have extended "knowing participation" liability to non-fiduciary parties in interest who engaged in transactions prohibited by the Act only confirms this view.

Congress' adoption of the section 502(*l*) civil penalty in the 1989 amendments to ERISA in the Omnibus Budget Reconciliation Act ("OBRA") does not mandate a contrary result. That provision creates rights only in favor of the Secretary of Labor, and, in fact, was designed to augment the resources available to the Secretary for ERISA enforcement. Moreover, contrary to the Solicitor General's suggestion, the imposition of a civil penalty upon amounts recovered from "other person[s]" who knowingly participate in a fiduciary's breach of trust does not necessarily recognize the existence of the

underlying cause of action here advocated by Petitioners. ERISA itself *does* permit monetary recoveries from "person[s]" other than the breaching fiduciary in a variety of contexts, *e.g.*, under its co-fiduciary liability and prohibited transaction provisions. Indeed, rather than supporting Petitioners' position, contemporaneous legislative history refutes their claim, since the very same Congress that enacted section 502(*l*) expressly *refused* to amend ERISA to extend to plan participants the very cause of action they ask this Court to create.

Petitioners' reliance on "traditional" trust law principles and their unsupported suggestion that Congress "could not have meant" to exclude non-fiduciaries from "knowing participation" liability are equally unavailing. The fact is that Congress *did* address the concept of "knowing participation" liability in ERISA and decided to limit its reach to fiduciaries on a number of occasions. While ERISA clearly was modeled, in large part, on trust law, "traditional" trust law notions simply cannot be used to alter or modify this Congressional choice. Moreover, any reliance on "traditional" trust law principles to do so here would be particularly inappropriate since in fashioning ERISA's fiduciary responsibility provisions, Congress modified the common law in a number of significant respects that have a direct bearing on the question of non-trustee liability, most notably, by expanding the definition of "fiduciary" to include a broad range of non-trustees.

Indeed, when stripped to its essence, Petitioners' argument amounts to little more than the familiar refrain repeatedly rejected by this Court—that this Court should recognize a cause of action because it represents "good policy." Such policy considerations have never been a basis for implying additional remedies under a federal statute, particularly where, as here, "Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981) (*quoted* with approval in *Massachusetts*

Mut. Life Ins. Co. v. Russell, 473 U.S. at 147). As this Court has made clear, "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981) (*quoted* with approval in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 145).

In any event, other than adding another potential "deep-pocket" defendant, the "salutary" impact of recognizing the cause of action advocated by Petitioners is far from certain. If nothing else, the existence of such a cause of action will markedly change the relationship between plan fiduciaries and sponsors, on the one hand, and advisors, on the other, to the detriment of all members of the employee benefit community. The ever-increasing complexity of employee benefit plan law and administration has made the assistance of professional advisors essential. However, while ERISA both encourages, and, in some cases, mandates their use,[1] the ERISA line between fiduciary and professional service provider has been clearly defined. Fiduciaries are responsible for plan administration and management. Although fiduciaries can, and increasingly must look to service providers for advice and assistance in discharging their duties, ultimate decision-making authority, as well as the ultimate responsibility for those decisions, remains with the plan fiduciaries.

The cause of action advocated by Petitioners would blur this distinction. In effect, it will make the advisor the "guarantor" of the fiduciary's actions under as-yet undeveloped legal standards that will have no statutory moorings and no limitations other than the ingenuity of the plaintiffs' bar and the courts. Faced with the spectre of this uncertain ERISA liability, professional service providers ~~may be~~ tempted to provide their advice in a manner that will limit their own potential liability

[1] *See, e.g.*, ERISA sections 403(c)(2) (authorizing use of advisors); 103(a)(3) (accountants required); and 103(a)(4) (actuary required for certain plans).

just as demonstrated by experience in the medical profession where the practice of "defensive," rather than "cost-effective" medicine has become the rule. Even apart from the attendant costs, such a result is hardly likely to advance the interests of plan fiduciaries who, in discharging their duties to participants and beneficiaries, must make decisions that are often difficult, rarely susceptible to one correct response, and always subject to second-guessing.

Nor will the negative consequences of this cause of action be limited to its impact on the advisory role played by professional service providers in the plan decision-making process. As easy and attractive "targets," professional service providers are sure to incur additional costs in guarding against, and ultimately defending the "strike" suits this cause of action will engender. These added costs of doing business inevitably will be passed on to plans themselves, and ultimately to their participants and beneficiaries. This Court therefore should refuse once again an invitation to "tamper with" ERISA's civil enforcement scheme and affirm the decision below. *Massachusetts Mut. Life Ins. Co.*, 473 U.S. at 147.

ARGUMENT

I. ERISA DOES NOT PROVIDE A CAUSE OF ACTION AGAINST A NON-FIDUCIARY SERVICE PROVIDER THAT KNOWINGLY PARTICIPATES IN A BREACH OF FIDUCIARY DUTY.

A. Given That Section 405(a) of ERISA Expressly Imposes Knowing Participation Liability, But *Only* Upon Plan Fiduciaries, ERISA's Civil Enforcement Scheme Does Not Permit the Cause of Action Advanced by Petitioners.

As this Court has frequently recognized, the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), is a carefully drawn, "comprehensive and reticulated" statute. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980); *accord, e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44-46 (1987).

In fashioning ERISA's comprehensive regulatory scheme, Congress included a "carefully integrated civil enforcement"[2] mechanism, set out in ERISA § 502(a), that expressly affords participants and beneficiaries of ERISA-regulated plans numerous remedies to protect their legitimate plan interests. This carefully-crafted civil enforcement mechanism does not authorize the cause of action that Petitioners seek to assert in this case—an action against a non-fiduciary service provider to recover plan losses based on his alleged knowing participation in a plan fiduciary's breach of duty.

As a threshold matter, the fact that Congress itself expressly addressed the imposition of "knowing participation" liability in section 405(a) of ERISA, but *limited* that exposure to plan fiduciaries, should dispose of the issue. By its express terms, section 405(a)(1) provides that "a fiduciary . . . shall be liable for a breach of fiduciary responsibility of another fiduciary if he participates knowingly in . . . an act or omission of such other fiduciary, knowing such act or omission is a breach." Thus, Congress clearly knew how to impose liability under ERISA for knowing participation in a fiduciary breach when it intended to do so. That it did so, but only for co-fiduciaries, is the best evidence that non-fiduciaries do not face such ERISA liability.

Given the absence of any substantive ERISA provision imposing such liability on non-fiduciaries, it is not surprising that ERISA's civil enforcement scheme *nowhere* authorizes the cause of action advocated by Petitioners. Section 502(a)(2)—ERISA's basic fiduciary liability enforcement provision—cannot support such a cause of action since it only permits suits "for appropriate relief under section 409." That latter provision, which, *inter alia*, establishes liability for losses suffered by a plan as a result of a breach of fiduciary duty, is specifically limited to "[a]ny person who is a fiduciary with respect to a plan." ERISA § 409(a). Accordingly, section 502(a)(2)

[2] *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 146.

necessarily authorizes actions *only* against a plan fiduciary.

Section 502(a)(3)—the only other civil enforcement section arguably available in this context—likewise cannot be read to authorize the cause of action Petitioners seek to assert. As the Ninth Circuit recognized in *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1988), any construction of section 502(a)(3) to authorize the very relief against non-fiduciaries specifically denied under sections 409 and 502(a)(2) would render those latter provisions "superfluous." Section 502(a)(3) thus cannot be construed broadly to sanction the imposition of ERISA liability on non-fiduciaries on a "knowing participation" basis without doing violence to fundamental canons of statutory interpretation. 845 F.2d at 873-74.

Moreover, the recognition of such a cause of action finds no textual support in section 502(a)(3). That provision authorizes plan participants to bring a civil action:

> (A) to enjoin any act or practice *which violates any provision of this title or the terms of the plan*, or (B) to obtain other appropriate equitable relief (i) to redress *such violations* or (ii) to *enforce any provisions of this title or the terms of the plan.*

ERISA § 502(a)(3) (emphasis added). Accordingly, a party is subject to suit under section 502(a)(3) *only* to secure his compliance with a substantive provision of ERISA or the plan, or to enjoin or redress his violation of either, and then *only* for equitable relief. Since ERISA neither imposes fiduciary duties on non-fiduciaries nor subjects them to liability for violations of its fiduciary responsibility provisions, section 502(a)(3) cannot be read to authorize actions against non-fiduciaries to recover plan losses resulting from a fiduciary breach on a "knowing participation" theory or otherwise. In sum, section 502(a)(3) is simply not available to both "create" and then to "enforce" against non-fiduciaries a liability nowhere imposed upon them by ERISA's substantive terms.

This, of course, is not to suggest that non-fiduciary service providers would never be subject to suit under section 502(a)(3), since ERISA does impose certain substantive obligations upon them. For example, because a service provider to an ERISA-regulated plan is a "party in interest" with respect to that plan, *see* ERISA § 3(14)(B), section 406 expressly prohibits certain transactions between it and an employee benefit plan. *See Nieto v. Ecker*, 845 F.2d at 873-74. A non-fiduciary service provider[3] who engages in transactions that violate this proscription would, under appropriate circumstances, be subject to suit under section 502(a)(3) for equitable relief to remedy this violation of the Act. *Id.*[4] Similarly, to the extent that certain service providers have express professional obligations under ERISA, *see* discussion, *infra*, their actions that violate such statutory duties might support an action for equitable relief against them under section 502(a)(3).

No such circumstances are present here. Petitioners have effectively conceded, by failing to appeal from adverse rulings in the courts below, that Respondent did not engage in any prohibited transactions under ERISA (Pet. Br. 7 n.2), and that Respondent did not breach its professional obligations under the Act (Cert. Pet. 7 n.3). Therefore, Petitioners have not and cannot identify any specific provision of ERISA that Respondent arguably has violated, much less one that imposes liability

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[3] Although section 406 is phrased in terms of a fiduciary's duty ("[a] fiduciary with respect to a plan shall not . . ."), the fact that the section also imposes duties on parties in interest is confirmed by ERISA § 502(i) and I.R.C. § 4975, which authorize the assessment of civil penalties and excise taxes upon a party in interest, or "disqualified person," under the Internal Revenue Code, who participates in a prohibited transaction.

[4] In addition, the prohibited transaction penalties and excise tax require correction of the prohibited transaction by the party in interest or disqualified person as a necessary predicate to avoid a punitive 100% excise tax. I.R.C. § 4975(b); ERISA 502(i).

upon it, and section 502(a)(3) does not authorize them to proceed.

B. The Legislative History Confirms That a Cause of Action Based on a Non-Fiduciary's Knowing Participation in a Fiduciary Breach is Not Available.

Despite the clear absence of any statutory basis for a knowing participation action against non-fiduciaries, Petitioners argue that "Congress could not have meant to exempt from liability those [non-fiduciaries] who knowingly assist in the commission of fiduciary breaches" (Pet. Br. 23). However, ERISA's legislative history demonstrates that the omission of the knowing participation cause of action sought by Petitioners was not inadvertent. Rather, that legislative history makes clear that Congress intended to protect participants' benefit interests and to regulate the relationship of non-fiduciary service providers to employee benefit plans by other means.

First, Congress adopted a function-based definition of "fiduciary," rather than a definition based on title or status, cognizant that such a definition would expand the universe of parties with fiduciary responsibility and potential fiduciary liability under ERISA.[5] Congress was well aware of the impact of this functional definition on service providers to employee benefit plans, such as consultants, attorneys and other professional advisors. In this regard, Congress made clear that while the performance of ordinary professional services would not make such parties fiduciaries to the plans they serve, they, like any other entity, would become ERISA fiduciaries if and to the extent that their

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[5] ERISA § 3(21); *see also* S. Rep. No. 127, 93d Cong., 1st Sess. 11 (1973) (one particular concern was "the types of persons who should be deemed pension 'fiduciaries' "); *accord*, H.R. Rep. No. 533, 93d Cong., 1st Sess. 7 (1973).

duties extended beyond their ordinary functions to encompass discretionary authority over a plan or its assets:

> While the ordinary functions of consultants and advisers to [ERISA] plans . . . may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of [a] plan or some authority or control regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.

H.R. Conf. Rep. No. 1280, 83d Cong., 2d Sess. 323 (1974) (hereinafter "ERISA Conf. Rep. No. 1280").[6] Where the activities of service providers did not extend into the fiduciary area, however, their ERISA status was limited to that of "party in interest" to a plan under ERISA § 3(14)(B). Thus, Congress clearly recognized the distinction between service providers who had acquired fiduciary status, and those who had not.

Second, contrary to Petitioners' implicit suggestion, this distinction is not one without meaning. Having adopted a functional definition of fiduciary, Congress consciously delineated the responsibilities and potential liabilities of ERISA fiduciaries, on the one hand, and of non-fiduciary parties in interest, on the other. *See* ERISA Conf. Rep. No. 1280, at 295 (Title I "applies rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries" while the conduct of non-fiduciary parties in interest is governed primarily under the tax provisions of Title II); at 299 (discussing knowing participation liability of co-fiduciaries); and at 306 (discussing allocation of rules of conduct for fiduciaries and parties in interest between Title I and Title II, respectively).

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[6] *Accord* 29 C.F.R. § 2509.75-5, Q&A-D-1 (1992).

Plan fiduciaries, including service providers who assume fiduciary status by virtue of their discretionary authority or control over a plan or its assets, were subjected to the full scope of ERISA liability. That liability, as noted earlier, expressly includes potential co-fiduciary exposure under section 405 for knowing participation in another's fiduciary breach.

In contrast, the potential exposure of non-fiduciary service providers generally was limited to the assessment of excise taxes under I.R.C. § 4975, or alternatively, of civil penalties under ERISA § 502(i), in the event they participate in a prohibited transaction. Indeed, in limiting the liability of non-fiduciary service providers in this fashion, Congress expressly considered and rejected the Senate-passed version of ERISA that would have imposed personal liability upon them for knowing participation in transactions prohibited by the Act.[7]

Congress' decision not to impose knowing participation liability on non-fiduciary service providers was not modified in any way by the subsequent adoption of section 502(*l*). Section 502(*l*) was added to ERISA by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (1989). While this section makes express reference to the "knowing participation" of "any other person" in a breach or violation of the fiduciary re-

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[7] The Senate-passed version of ERISA, H.R. 2, 93d Cong., 2d Sess., § 511(i) (1974), *reprinted in* Senate Subcommittee on Labor, 94th Cong., 2d Sess., Legislative History of the Employment Retirement Income Security Act of 1974, pt. III, at 3780 (Comm. Print 1974) would have amended the Welfare and Pension Plans Disclosure Act to establish personal liability for losses to a plan fund not only on the part of fiduciaries, but also on the part of "[a]ny party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act aplies." *Compare* ERISA Conf. Rep. No. 1280, at 295 (under the Senate bill, fiduciaries and parties in interest would have been personally liable for losses sustained by a plan). This provision was rejected by the ERISA conferees.

sponsibility provisions of ERISA, it does so only in the context of the mandatory assessment by the Secretary of Labor of the new civil penalty established by that provision.

Thus, by its express terms, section 502(*l*) creates *only* a civil penalty in favor of the Secretary; it does *not* create any cause of action or rights against non-fiduciaries in favor of participants and beneficiaries. That it does not extend any rights to participants and beneficiaries is underscored by the fact that the civil penalty is payable only to the Government and was adopted specifically to augment the Secretary's resources for ERISA enforcement, in lieu of an increase in the premiums payable to the Pension Benefit Guaranty Corporation ("PBGC") for plan termination insurance. H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 431-32 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 3034-35. Moreover, the penalty can only be assessed in connection with actions "instituted by the Secretary" under sections 502(a)(2) or 502(a)(5) (permitting actions by the Secretary for equitable relief), or in connection with settlements reached by the Secretary.

Nor is the imposition of the section 502(*l*) penalty upon "persons" other than fiduciaries necessarily premised on the existence of an underlying cause of action against non-fiduciaries for knowing participation in a fiduciary breach as the Solicitor General contends. S.G. Br. at 7-8. To the contrary, there *are* instances under ERISA where a "recovery" can be obtained from a "person" other than the fiduciary who has engaged in the breach even in the absence of such an underlying cause of action. For example, Section 405 identifies an entire category of "other person[s]"—co-fiduciaries—who face express liability under ERISA where they "knowingly participate" in a fiduciary's breach of trust. Similarly, the Secretary of Labor may obtain from non-fiduciary parties in interest monetary payments to plans to "correct" prohibited transactions.[8] The Department of Labor both in the preamble to, and its proposed regulations under section 502(*l*) made clear that the civil penalty will be assessed against amounts recovered in correction of prohibited transactions. DOL Prop. Reg. § 2560.502(*l*)-1(c), 55 Fed. Reg. 25288, 25289-90 (1990).[9] Thus, this Court's refusal to expand ERISA's civil enforcement scheme to include an additional remedy against non-fiduciaries in no way will render section 502(*l*) a nullity insofar as "other person[s]" are concerned.

Indeed, any doubt that Congress did not intend to expand the remedies available to plan participants or beneficiaries through section 502(*l*) is dispelled by contemporaneous legislative history. The same Congress that adopted section 502(*l*) simultaneously refused to adopt a House-passed amendment to ERISA section 409 that would have expressly overruled the Ninth Circuit's decision in *Nieto v. Ecker* and imposed personal liability on non-fiduciaries for any monetary losses suffered by a plan as a result of a fiduciary breach in which they knowingly participated. *Compare* H.R. Rep. No. 247, 101st Cong., 1st Sess. 77-78 (1984), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1969-70, *with* H.R. Conf. Rep No. 386, *supra*. Thus, at the same time that Congress adopted section 502(*l*), it refused to extend to plan participants the very cause of action they now seek. This Court must do likewise.[10]

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[8] Under I.R.C. § 4975(f)(5), correction requires:

> undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

Id., *see also* I.R.C. § 4975(h) (Secretary of Labor's right to seek a correction before imposition of 100 percent excise tax).

[9] Indeed, Congress recognized this nexus between the section 502(*l*) penalty and the prohibited transaction sanctions by permitting the penalty to be an offset against the prohibited transaction sanctions. *See* ERISA Section 502(*l*)(4).

[10] Petitioners' suggestion that a knowing participation cause of action must be available to them because the language of the

C. Where Congress Has Expressly Addressed Knowing Participation Liability and the Scope of Non-Fiduciary Service Providers' Duties Under ERISA, an Additional Federal Common Law Remedy Should Not Be Implied.

As this Court made clear in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 146, courts "must be chary" of importing remedies into ERISA that are not expressly provided in the statute: "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 146; *see also Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981) ("'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme[.]'".) (*quoting Northwest Airlines v. Transport Workers*, 451 U.S. 97 (1981)). That presumption should be conclusive here, given that Congress did not impose "knowing participation" liability on non-fiduciaries in enacting ERISA, and thereafter refused to override that choice in enacting the OBRA amendments.

The indisputable fact that ERISA's fiduciary responsibility provisions were based, with appropriate modifications, on the traditional law of trusts, *see, e.g.*, H.R. Rep. No. 533, 93d Cong., 2d Sess. 13, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643, does not require a different result. While a knowing participation cause of action may have been available against non-trustees as a traditional trust law remedy, *see* Pet. Br. 20, neither ERISA's

general civil enforcement provision in favor of the Secretary (ERISA § 502(a)(5)) is the same as that in favor of participants (ERISA § 502(a)(3)) is unavailing. (Pet. Br. 15.) While both provisions permit suit "to enforce any provision of [title I]," section 502(*l*), by its express terms, mandates the assessment of a civil penalty only in connection with suits brought by, or settlements with, the Department of Labor. It confers no rights on, and cannot be enforced by, plan participants and beneficiaries.

legislative history nor this Court's decisions suggest that traditional trust law can or should be incorporated wholesale into the statute, or be used to create or to imply an ERISA cause of action. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (fiduciary provisions "'codif[y] and mak[e] applicable to [ERISA] fiduciaries *certain principles* developed in the evolution of the law of trusts.'") (emphasis added) (*quoting* H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973)). Rather, as the Eleventh Circuit has recognized:

> the statute is, in its contours, meaningfully distinct from the body of the common law of trusts. . . . [A] court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute.

Useden v. Acker, 947 F.2d 1563, 1581 (11th Cir. 1991).

Rather than refuting this inference, ERISA suggests a clear departure from the common law in this area. Under traditional trust law principles, only the trustee was in a fiduciary relationship to the trust and its beneficiaries, *see Restatement (Second) of Trusts* § 2 Comment b (1959); I William F. Frachter, *Scott on Trusts* § 2.5 (4th ed. 1987), so that fiduciary duty principles alone could not provide any basis of recovery against non-trustees. Accordingly, the recognition of a knowing participation cause of action provided a basis at common law to reach non-trustees who, although not fiduciaries, were responsible, at least in part, for the trust's losses. *See Restatement (Second) of Trusts* at § 326; I *Scott on Trusts* at § 326.5; George T. Bogert, *Trusts* §§ 166-67 (6th ed. 1987).

Congress approached this problem differently in ERISA, as noted earlier, by adopting a functional definition of fiduciary that greatly expands the universe of accountable persons. As a result, ERISA's fiduciary principles are available to impose liability on *any* party who exer-

cises sufficient discretionary authority or control over a plan or its assets to cause a loss, regardless of his status or title. Moreover, once a party attains fiduciary status, ERISA expressly imposes co-fiduciary liability on him for another fiduciary's misconduct not only when he knowingly participates in or conceals a breach of duty, but also when he fails to take reasonable steps to correct a breach that he discovers. *See* ERISA § 405(a). Congress' express expansion of fiduciary liability under ERISA beyond trustees and its express imposition of knowing participation liability on co-fiduciaries alone negates any notion that it intended the courts to expand liability still further to non-fiduciaries by reference to trust law principles.[11]

II. THE CREATION OF AN ERISA CAUSE OF ACTION FOR NON-FIDUCIARY KNOWING PARTICIPATION WOULD NOT SERVE THE PURPOSES OF ERISA.

The creation of an ERISA common law remedy against non-fiduciary service providers is not essential to implement the benefit protection purpose of the statute. Moreover, the creation of such a remedy could be expected to have significant adverse consequences for all parties involved with ERISA-regulated plans, including service providers, plan sponsors and fiduciaries, and, ultimately, plan participants and beneficiaries.

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[11] As noted earlier, Congress also addressed the problem of third party liability through its enactment of ERISA's prohibited transaction rules. Those provisions specifically prohibit certain specified transactions between plans and parties in interest. *See* ERISA § 406(a). Non-fiduciaries who engage in transactions violative of those provisions are subject not only to liability for excise taxes and civil penalties, but also for appropriate equitable relief to reverse the illegal transaction under ERISA section 502(a)(3). *See, e.g., Nieto v. Ecker*, 845 F.2d at 868. Moreover, they are subject to such relief regardless of whether they engaged in such transactions with knowledge of their illegality. *Call v. Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989); *Nieto v. Ecker*, 845 F.2d at 868.

A. Professional Service Providers Are Not Free From Oversight or Regulation Under ERISA

Contrary to Petitioners' arguments, ERISA itself protects employee benefit plans against misconduct by service providers in a variety of fashions. For example, ERISA has created a comprehensive structure for governmental oversight of employee benefit plans by the Secretary of Labor, Secretary of the Treasury, and, in the case of defined benefit pension plans, the Pension Benefit Guaranty Corporation. Similarly, ERISA's prohibited transaction provisions specifically proscribe a wide variety of transactions between employee benefit plans and service providers. *See* ERISA § 406. Moreover, two important categories of service providers—accountants and actuaries—are subject to various duties and obligations under the Act. *See* ERISA § 103(a)(3) qualified public accountants); § 103(a)(4) (enrolled actuaries); § 103(d) (actuarial reports); §§ 3041-42 (enrollment of actuaries). Finally, service providers who violate any of the express provisions of ERISA regulating their conduct are subject to suit for appropriate equitable relief under section 502(a)(3).

These specific statutory provisions are complemented by the professional codes of conduct applicable to professional service providers such as actuaries, accountants and lawyers. In the case of actuaries to ERISA plans, ERISA itself provides such supervision through the Joint Board for the Enrollment of Actuaries ("JBEA") which it created. ERISA §§ 3041-42; *see* 20 C.F.R. Part 901 (1992). Lawyers and accountants, on the other hand, are subject to state examination, licensing, and regulation, and may be disciplined by state authorities in appropriate cases for breach of such professional standards. In enacting ERISA, Congress was well aware of the existing state licensing and regulation of professional duties and relationships in the case of accountants and attorneys. In-

deed, Congress created the JBEA to provide a comparable licensing and regulatory body for actuaries. H.R. Rep. No. 807, 93d Cong., 2d Sess. 27-28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4758-59; *accord*, S. Rep. No. 127, 93d Cong., 2d Sess. 17, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4853.

B. The Cause of Action Advocated by Petitioners Will Transform the Role Played by Professional Service Providers in the Plan Decision-Making Process, to the Detriment of All Members of the Employee Benefit Plan Community

To understand the impact a knowing participation cause of action would have on the relationship between professional service providers and the plans or plan sponsors they serve, it is necessary to review the role that professional service providers play under ERISA. While professional service providers are not free from regulation under ERISA, there is no question that the principal focus of Congress' remedial scheme was the plan fiduciary. Plan fiduciaries are subjected to an exacting code of conduct under the Act and are charged with ultimate responsibility for all aspects of plan administration and management. *See* ERISA § 2; ERISA §§ 402-410.

ERISA clearly permits plan fiduciaries to retain professional service providers to assist them in discharging their plan responsibilities (ERISA § 402(c)(2)), and, in some cases, mandates their use. *See* ERISA § 103(a)(3) (actuaries); ERISA § 103(a)(4) (accountants). Moreover, the ever-increasing complexity of employee benefit law and administration has encouraged even greater use of professional service providers. Nevertheless, the ERISA line between fiduciary and advisor remains clear. Although fiduciaries can look to service providers for advice and assistance in discharging their plan duties, ultimate decision-making authority, as well as the ultimate responsibility for those decisions, remains with the plan

fiduciaries. ERISA § 402(a)(1); ERISA § 404; ERISA § 409. The service provider's role is advisory, not fiduciary.[12]

In addition to plan fiduciaries, service providers give assistance to plan sponsors, typically employers, in making a variety of plan-related decisions. Those decisions, relating to such matters as plan establishment, design, amendment and termination, are "settlor" functions that are outside the purview of ERISA's fiduciary responsibility provisions. DOL Inf. Letter (Mar. 2, 1987), *reprinted in* 14 BNA Pen. Rep. No. 14, at 430 (1987). As the courts have observed:

> There is a world of difference between administering a [benefits] plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second. . . .
>
> The case law . . . makes it clear that when an employer decides to establish, amend or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

Musto v. American General Corp., 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 912 (1989). In this context, not only is the service provider's role advisory, but also, neither the plan sponsor nor the service provider is a fiduciary.

In rendering their advice, professional service providers frequently are presented with issues as to which there is no single, uniquely correct answer. In the case of an actuary, the issue presented is the funding of a plan, to provide the promised level of benefits, over a period that

[12] Only in one circumstance—investment advice for a fee—does the provision of advice make a service provider a fiduciary. *See* ERISA § 3(21)(A)(ii).

extends thirty to fifty years into the future. The actuary cannot predict with certainty which participants ultimately will receive benefits under the plan, the aggregate amount of their benefits, or the date on which benefit payments will commence. Nor can the actuary know the future rate of return on plan assets. Instead, the actuary must estimate the plan's funding requirements based on appropriate actuarial assumptions about the future and on the plan sponsor's selection of a funding method to provide for the distribution of funding requirements over the future.[13]

The actuarial assumptions with respect to a plan are separate and distinct from the plan's funding method, and it is the role of the actuary to select these assumptions consistent with its obligations under the Act. In so doing, the actuary must develop informed estimates as to (1) the factors that will determine the amount of

[13] The sponsor of an ERISA plan, generally the employer, selects a funding method, with the actuary's advice, from the limited range set forth in section 3(31) and Treasury Regulations §§ 1.412(c)(1)-1 to (c)(3)-2. Once selected, the funding method may be changed only with the approval of the Secretary of the Treasury. ERISA § 302(c)(5).

The selection of a funding method is not a fiduciary decision under ERISA, but is instead a "settlor" function, which permits the decision to be made without regard to the exclusive interests of plan participants and beneficiaries. Both the labor and tax law provisions of ERISA include detailed "minimum funding standards," *see* ERISA §§ 302-07; I.R.C. § 412, that rest the responsibility for making plan contributions on the sponsoring employer or employers, ERISA § 302(c)(11); I.R.C. § 412(c)(11), not on plan fiduciaries. (Significantly, the rules governing the minimum funding level in Title I of ERISA do not appear in part 4, relating to fiduciary responsibilities, but instead are codified in a separate part 3.) Consistent with this allocation of responsibility, the penalty for failure to make required plan contributions is a lien (in favor of the plan) on the property of the delinquent employer or employers and other members of the same "controlled group" (within the meaning of I.R.C. §§ 414(b), (c), (m), (o)). ERISA § 302(f); I.R.C. § 412(n). In addition, excise taxes are imposed, again on the delinquent employer or employers, pursuant to I.R.C. § 4971.

plan assets in the future, such as future interest rates and plan investment earnings, and (2) the factors that will determine the aggregate amount of benefits ultimately due from the plan, such as future employee turnover and compensation increases. Because these estimates cannot be definitively correct or incorrect, a pension plan's actuary generally proceeds by developing a range of acceptable assumptions before making a final selection. And in making that final selection, the actuary will consider the views of other parties, including the plan sponsor who is often the best source of information about probable employee turnover, early retirement rates, and similar factors.

As demonstrated in Part I, *supra*, ERISA does not impose fiduciary duties on service providers in the performance of their ordinary professional responsibilities such as that involved in this case. The absence of fiduciary status is compelling where actuaries are selecting appropriate assumptions for a pension plan, because—contrary to the implicit theory of Petitioner's complaint—no one set of assumptions is invariably appropriate and in the best interests of all plan participants and beneficiaries. For example, a conservative set of assumptions may overstate the actual costs of a plan over time, resulting in a lower level of promised plan benefits (due to their estimated cost) than the plan sponsor could reasonably afford to provide. A more aggressive set of assumptions, on the other hand, may understate future costs, resulting in a higher level of benefits under the plan in its early years but creating a greater risk of future underfunding.[14] Given the inherent potential conflicts among the interests of individual participants in

[14] The set of assumptions involved in this case included the probable rate of early retirement under a plan. It is particularly difficult to develop accurate assumptions about early retirement rates, which—unlike factors such as mortality and even normal employee turnover—vary with events that do not occur systematically and depend heavily on future economic conditions.

the same pension plan, such decisions could never be made in accordance with ERISA's exacting fiduciary standards. ERISA recognizes this by placing such matters outside the purview of its fiduciary standards, and instead, limiting a plan sponsor's choice of funding methods, and, in certain respects, limiting the range of permissible interest rates for actuarial assumptions. *See* ERISA § 302(b)(5)(B)(ii)(I).

If the Court creates the cause of action urged by Petitioners, the non-fiduciary and advisory role of the service provider under ERISA would be dramatically altered. Such a cause of action would largely eviscerate ERISA's distinction between fiduciary and non-fiduciary roles and liabilities, by making service providers legally answerable for decisions that are, under ERISA, entrusted to plan sponsors and fiduciaries. As a result, service providers to ERISA-regulated plans could no longer be certain of the scope of their professional duties, much less the extent of their legal liability in performing those duties. Rather, they would find their best professional estimates or judgments subject to attack based on subsequent, often unpredictable, events.

Equally disturbing is the fact that the legal standards under which their actions would be challenged are as yet undeveloped. Under current law, the elements of a non-fiduciary's "knowing participation" liability to ERISA participants are unknown; indeed, the courts that have addressed such liability have articulated divergent standards. If such liability were based on the same principles as co-fiduciary liability under section 405, *cf. Fink v. National Savs. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum), then knowing participation could encompass even a passive failure to prevent or to correct a fiduciary breach. *See* ERISA § 405(a)(3) (co-fiduciary liable if he fails to make reasonable efforts to remedy a fiduciary breach known to him); ERISA Conf. Rep. No. 1280 at 299-300 (discussing co-fiduciary liability).[15] The Seventh Circuit, by contrast, has sought to apply a different standard, requiring an active conspiracy between plan fiduciaries and a non-fiduciary. Thus, in *Pappas v. Buck Consultants, Inc.*, 938 F.2d 531, 542 (7th Cir. 1991), that court held that allegations of incorrect advice and misleading reports by a plan actuary did not state an ERISA claim, because there were no allegations of knowing inducement or conspiracy. *Accord Thornton v. Evans*, 692 F.2d 1064, 1082 & n.42 (7th Cir. 1982) (conspiracy is necessary element of non-fiduciary liability).

Nor will the negative consequences of this cause of action be limited to service providers. Faced with the spectre of this uncertain liability, professional service providers may be tempted to provide their advice in a manner that will limit their own exposure. As demonstrated by analogous experience in the medical profession where the practice of "defensive" rather than "cost-effective" medicine has become the rule, it is hardly likely that the most conservative advice from the advisor's perspective will prove to be the most useful or effective from the plan decision-maker's point of view.[16]

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[15] This standard apparently was applied by the Second Circuit in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 at 282-84 (2d Cir. 1992), where (without referring to section 405) the court held that a non-fiduciary could be held liable without proof of intent to harm, with only constructive knowledge of fiduciary's breach, and by merely "failing to act when required to do so." This appears to impose a higher standard of duty on a non-fiduciary than expressly imposed on a co-fiduciary under ERISA section 405. *See* ERISA Conf. Rep. No. 1280 at 299 ("the fiduciary must know the other person is a fiduciary with respect to the plan, must know that he participated in the act that constituted a breach, and must know that it was a breach").

[16] Actuaries, for example, could be expected to select only the most conservative assumptions to reduce, insofar as the actuary may, the risk of future underfunding. But, as noted earlier, conservative assumptions are not invariably appropriate or in the best interests of every plan participant.

Thus, rather than promoting ERISA goals, this cause of action may actually work to deprive plan decision-makers of the type of objective and disinterested information they need in making plan decisions that are often difficult, rarely have one correct answer, and always can be second-guessed.

Moreover, while the prospect of an additional "deep-pocket" defendant in cases of this type may be attractive to the plaintiffs' bar, it is not without cost. Unlike plan fiduciaries who are frequently employees of the plan sponsor and customarially indemnified to the fullest extent permitted by ERISA by the party appointing them, professional service providers rarely enjoy such protection for their plan-related activities. Thus, the expenses incurred by professional service providers in guarding against, and ultimately defending the "strike" suits this cause of action will engender will represent an additional cost of doing business.[17] These costs will inevitably be passed back to the plans in the form of increased fees, to the ultimate detriment of the plans' participants and beneficiaries.

None of these predictable results would serve ERISA's primary purpose " 'to promote the interests of employees' " in employee benefit plans, *Firestone*, 489 U.S. at 113 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) and citing *Russell*, 473 U.S. at 148), because of the attendant costs. Congress was concerned not to burden plans so heavily by ERISA's requirements that "employers respond . . . by decreasing benefits under

[17] Indeed, the potential liability of certain service providers such as actuaries may prove to be substantially greater than for indemnified fiduciaries, or third parties that provide services within a narrowly defined role. The allegations against Respondent in this case, for example, could easily be interpreted to make it liable for mere knowledge of a decision by the plan sponsor to fund the plan at a certain level even though the Respondent's role did not make it responsible for that decision.

existing plans or slowing the rate of formation of new plans. . . ." H.R. Rep. No. 807 at 15, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. The various provisions of ERISA accordingly reflect Congress' "careful balancing" of the need to promote and to protect employees' benefits against "the public interest in encouraging the formation of employee benefit plans" by not imposing undue costs. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 54 (§ 502(a) enforcement scheme); *see also* H.R. Rep. No. 533, at 1, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40 (projected cost of each provision was analyzed in relation to anticipated benefit). That balance should not be upset here.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 21, 1992

No. [illegible]

In The Supreme Court of the United States

October Term, 198[illegible]

William J. [illegible], Alex V. [illegible], [illegible] A. [illegible] and [illegible] Frank,

Petitioners,

v.

[illegible] Associates, an Illinois Partnership,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The [illegible] Circuit

BRIEF OF AMICUS CURIAE AMERICAN COUNCIL OF LIFE INSURANCE SUPPORTING RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1671

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,
Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN COUNCIL OF LIFE INSURANCE SUPPORTING RESPONDENT

INTEREST OF THE *AMICUS CURIAE**

The American Council of Life Insurance (the "Council") is a national trade association representing 616 life insurance companies which, in the aggregate, have approximately 94% of the assets of all United

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* Petitioners and Respondent have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

States life insurance companies and 98% of the insured pension business. Together, these companies play a major role in the operation of the nation's employee benefit system through the offer and sale of pension, health, and life insurance products and services to employee benefit plans. As of 1991, the Council estimates that life insurance companies held $590 billion under contracts for the funding and payment of pension and welfare benefits in connection with employee benefit plans covering over 140 million participants and beneficiaries. In addition to providing products for the funding and payment of benefits, life insurance companies perform a wide range of important services for employee benefit plans including, but not limited to, providing actuarial advice and performing actuarial calculations, advising and assisting plans in the preparation of plan documents and reports, and performing discretionary or ministerial services in connection with the administration and processing of benefit claims. Accordingly, the Council has a significant interest in the outcome of this case and can demonstrate the extremely broad and adverse effects that the creation of an ERISA cause of action for damages against nonfiduciaries will have on the provision of products and services vital to employee benefit plans.

Life insurance companies offer products and provide services and professional advice to employee benefit plans in a myriad of circumstances in which they act in a nonfiduciary capacity. Thus, for example, courts have recognized that an insurer is not acting in a fiduciary capacity in offering its life, health, or annuity policies for sale to employee benefit plans when it exercises no discretionary authority or control

over a plan's decision as to whether or not to purchase the policy.[1] Likewise, courts have recognized that an insurer is not acting as a fiduciary when it performs actuarial, claims or benefit administration, and other services for an employee benefit plan in an advisory or ministerial capacity without any power to make final decisions on behalf of a plan (*e.g.*, when it renders actuarial advice to a plan which a plan fiduciary is free to accept or reject; when it disburses benefits at the direction of or subject to policies established by a plan fiduciary).[2]

The theory of nonfiduciary liability, which the Petitioners in this case have advanced and which some circuit courts of appeal have adopted, would make every life insurance company and every other prov-

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[1] *See, e.g., Flacche v. Sun Life Assur. Co. of Canada*, 958 F.2d 730, 734-35 (6th Cir. 1992); *Consolidated Beef Inds., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 965 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992); *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc'y of the United States*, 841 F.2d 658, 664 (5th Cir. 1988); *Schulist v. Blue Cross*, 717 F.2d 1127, 1130-32 (7th Cir. 1983); *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 729 F. Supp. 1162, 1185-91 (N.D. Ill. 1989), *aff'd*, 941 F.2d 561 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1182 (1992); *Austin v. General Am. Life Ins. Co.*, 498 F. Supp. 844, 846 (N.D. Ala. 1980).

[2] *See, e.g., Flacche*, 958 F.2d at 734-35; *Baker v. Big Star Div. of Grand Union Co.*, 893 F.2d 288, 289-90 (11th Cir. 1989); *Trustees of Laborers' Local 72 Pension Fund v. Nationwide Life Ins. Co.*, 783 F. Supp. 899, 908 (D.N.J. 1992); *Home Life Ins. Co.*, 729 F. Supp. at 1185-91; *Munoz v. Prudential Ins. Co.*, 633 F. Supp. 564, 567-68 (D. Colo. 1986); *see also Useden v. Acker*, 947 F.2d 1563, 1575-76 (11th Cir. 1991), *pet. for cert. filed* 60 U.S.L.W. 3843 (June 1, 1992); *Schulist*, 717 F.2d at 1130-32; *Fechter v. Connecticut Gen. Life Ins. Co.*, 800 F. Supp. 182, 202-08 (E.D. Pa. 1992).

ider of products and services to employee benefit plans a potential defendant in any instance in which a plan fiduciary is alleged to have breached its fiduciary duties in purchasing their products, in acting on their professional advice, or in directing the performance of their administrative services. Moreover, they would be liable for monetary damages to exactly the same extent as the plan fiduciary (or fiduciaries) on whose breach of duties their liability would be based, notwithstanding the fact that they owed no similar duties of their own to such plans. The Council submits that such an extreme hazard of doing business with employee benefit plans, which must inevitably and adversely affect the availability and cost to them of important products and services, should only be imposed under ERISA as the result of a deliberate congressional policy decision clearly evidenced in the text and legislative history of that statute. As demonstrated below, no such evidence exists.

SUMMARY OF THE ARGUMENT

This case provides an occasion for the Court to consider whether ERISA authorizes a cause of action to recover monetary damages from a nonfiduciary who is alleged to have knowingly participated in an ERISA fiduciary's breach of its fiduciary duties. In order to protect the financial integrity of employee benefit plans and the interests of their participants and beneficiaries, ERISA broadly imposes fiduciary status on those persons who exercise discretionary authority or control with respect to the administration and management of such plans and their assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).[3] Those persons who are defined as fiduciaries under ERISA are subject to a detailed and comprehensive scheme of regulation which imposes upon fiduciaries rigorous duties and standards of conduct, specifically establishes their liability for breaches of duty, and prescribes the remedies which are available in the event of such breaches. ERISA's integrated civil enforcement provisions, in turn, specify which parties are authorized to bring suit to redress breaches of fiduciary duties. Nowhere in this detailed scheme of fiduciary duties, liability, and accountability is any express provision made to extend liability for breaches of fiduciary duties to persons other than fiduciaries.

The legislative history of ERISA demonstrates that Congress was fully cognizant of the fact that plan fiduciaries in carrying out their responsibilities to administer employee benefit plans would need to avail themselves of the products, services, and professional advice of numerous other parties who would interact with such plans in a nonfiduciary capacity.[4] Neither

[3] *See also* 120 Cong. Rec. 29932 (daily ed. Aug. 22, 1974) ("the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets") (remarks of Senator Williams), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974* at 4743; 120 Cong. Rec. 29957 (daily ed. Aug. 22, 1974) ("In addition, frequently the pension funds themselves are abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them") (remarks of Senator Ribicoff), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974* at 4823.

[4] *See, e.g.*, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 3 *Legislative History of the Employee Retirement*

the text nor the legislative history of the statute, however, evidence any intent to establish liability for those parties in connection with a fiduciary's breach of duties or to hold them accountable to the same extent as a fiduciary for monetary damages as a remedy for such breaches.

In the absence of any express provision in ERISA for a cause of action against a nonfiduciary to recover monetary damages, Petitioners in this case argue that such a cause of action should be implied in the statute or added as a matter of federal common law. Petitioners assert that this cause of action was available under the common law of trusts and can be either implied in ERISA under section 502(a)(3), which provides plan participants and beneficiaries with the right to secure "appropriate equitable relief" as a remedy for ERISA violations, or added to the statute in order to accomplish ERISA's purposes. Petitioners' position is inconsistent with a fair evaluation of congressional intent, this Court's precedents, and applicable rules of statutory construction.

While this Court has noted that certain terms used in ERISA should be interpreted with reference to the common law of trusts and has authorized the adoption of common law trust principles to fill gaps left in the

Income Security Act of 1974 4277, 4590 (discussing "the ordinary functions of consultants and advisers to employee benefit plans"); H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 2 *Legislative History of the Employee Retirement Income Security Act of 1974* 3115, 3212-14 (discussing "actuaries who perform services for qualified pension plans"). *See also* S. Rep. No. 383, 93d Cong., 1st Sess. (1973), *reprinted in* 1 *Legislative History of the Employee Retirement Income Security Act of 1974* at 1091-92, 1136.

statute,[5] it has made it clear that the courts' freedom to engage in interstitial lawmaking under ERISA is limited to those areas in which there is clear evidence that an omission was the result of congressional inadvertence or of a conscious decision to leave a matter to the courts to resolve through the development of federal common law.[6] The text and legislative history of ERISA provide no evidence that either was the case with respect to the omission of a cause of action against nonfiduciaries to recover monetary damages. Given the detail with which Congress has set forth the liability of fiduciaries for breach of fiduciary duty and the remedies available in the event of such breaches, it would be unreasonable to infer that in declining to provide for parallel liabilities and remedies with respect to nonfiduciaries "Congress's silence is accidental in an area where Congress has already said so much out loud." *Useden v. Acker*, 947 F.2d 1563, 1582 (11th Cir. 1991), *pet. for cert. filed*, 60 U.S.L.W. 3843 (June 1, 1992).

The argument that a cause of action for monetary damages against a nonfiduciary may be implied from the provision in section 502(a)(3) that participants may "obtain other appropriate equitable relief" to redress violations of ERISA is untenable. It is well settled that compensatory damages are a classic form of legal, not equitable relief, and the great majority of courts which have interpreted section 502(a)(3) have held that the language of that section does not en-

[5] *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989).

[6] *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

compass the award of money damages. In those situations in which Congress intended to authorize the award of monetary damages for violations of ERISA, it made its intention clear in plain and unmistakable language. More fundamentally, as this Court has recognized, "the question [of] whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979). Thus, answering the question of whether section 502(a)(3) authorizes monetary damages as a form of equitable remedy does not answer the question of against whom such remedy may be enforced and under what circumstances. Section 409 explicitly limits liability for breaches of fiduciary duties to fiduciaries. Section 502(a)(3) merely provides for the enforcement of rights and liabilities created elsewhere in the statute and cannot be fairly read to impose liabilities on nonfiduciaries where none otherwise exist.

The addition to ERISA in 1989 of section 502(*l*), which gives the Secretary of Labor the power to assess civil penalties against fiduciaries who breach their fiduciary duties and other persons who participate in an ERISA fiduciary breach, provides no evidence whatsoever of a congressional intent to authorize a private cause of action to recover monetary damages from nonfiduciaries. Indeed, a proposed amendment to create such a cause of action and to specifically overrule the decision upon which the Ninth Circuit's ruling in this case was based, was deleted from the same legislation in which section 502(*l*) was included. Petitioners and their *amici* assert that section 502(*l*) reflects a congressional "confirmation" that ERISA

as enacted authorizes a private right of action against nonfiduciaries for monetary damages, arguing that civil penalties could not be recovered under that section unless the Secretary of Labor had the right to recover monetary damages from nonfiduciaries as a form of equitable relief under other remedial provisions of ERISA. That argument is totally without merit. Section 502(*l*) does not amend any other provision in ERISA (other than empowering the Secretary in section 502(a)(6) to bring such a penalty action) or alter the plain meaning of the term "appropriate equitable relief." If Congress provided no indication of any intent to authorize a cause of action against nonfiduciaries or to authorize the recovery of monetary damages as a form of "appropriate equitable relief" when it enacted ERISA, the subsequent failure of Congress to amend that statute to specifically provide such authority likewise offers none. Moreover, even if Congress in adopting section 502(*l*) had acted on the basis of an opinion that ERISA already provided a right of action for monetary damages against nonfiduciaries, any opinion attributed to a Congress fifteen years after ERISA's enactment cannot be considered evidence of congressional intent in 1974.

Petitioners' last resort is to argue that employee benefit plans may be denied full relief if they are unable to seek a recovery of monetary damages against nonfiduciaries who are alleged to have participated in a fiduciary breach. They assert that Congress could not have intended in enacting ERISA to have denied employee benefit plans an important protection that was available under the common law of trusts. The best evidence of congressional intent, however, is the text of the statute and its legislative

history, which simply do not support Petitioners' argument. The legislative history of ERISA reflects a congressional intent to "strike a balance between providing meaningful reform and keeping costs within reasonable limits."[7] While a cause of action against nonfiduciaries undoubtedly would provide employee benefit plans with additional sources of recovery in the event of fiduciary breaches, it would at the same time adversely affect the availability and cost to such plans of essential products and services provided to them by countless parties who act in a nonfiduciary capacity. Particularly in view of the significant extent to which ERISA improves upon the overall protections formerly afforded to employee benefit plans and their participants, Petitioners' policy arguments are a totally inadequate basis for incorporating in ERISA a particular common law cause of action which Congress declined to expressly include.

ARGUMENT

A. ERISA DOES NOT AUTHORIZE A PRIVATE RIGHT OF ACTION AGAINST NONFIDUCIARIES FOR KNOWING PARTICIPATION IN A FIDUCIARY BREACH

1. ERISA Expressly Limits Liability For Breaches Of Fiduciary Duties To Fiduciaries And Co-Fiduciaries

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). ERISA's statutory text is clear regarding

[7] H.R. Rep. No. 779, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 2 *Legislative History of the Employee Retirement Income Security Act of 1974* at 2604.

the liability of nonfiduciaries in connection with breaches of fiduciary duties—none is provided.[8] ERISA sections 409 and 405, the only provisions in the statute that establish liability for breach of fiduciary duty, expressly limit such liability to "any person who is a fiduciary" who breaches his fiduciary duties[9] and co-fiduciaries who are expressly made liable for the breach of another fiduciary under certain circumstances, including their knowing participation in such breach.[10]

In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), this Court refused to create a cause of action which would have allowed "an entirely new *class* of relief" for fiduciary breach not specified in section 409(a). 473 U.S. at 141 (emphasis original) (citations omitted). In light of "ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a comprehensive and reticulated statute," *id.* at 146 (quoting *Nachman Corp v. PBGC*, 446 U.S. 359, 361 (1980)), this Court reasoned "that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* (emphasis original). Accordingly, where Congress has expressly authorized relief for breach of fiduciary duty only against any person who is a

[8] Because ERISA's text is clear, the burden on a party proposing a statutory interpretation at odds with the text is "*exceptionally heavy.*" *Union Bank v. Wolas*, 112 S. Ct. 527, 530 (1991) (emphasis added). *See also Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2593 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished").

[9] 29 U.S.C. § 1109(a).

[10] *Id.* at § 1105(a).

fiduciary, a congressional intent to authorize such relief against an entirely different class of persons cannot be implied.

2. The Text And Legislative History Of ERISA Preclude The Incorporation Of Common Law Trust Principles To Create A Cause Of Action Against Nonfiduciaries Which Was Not Expressly Included In The Statute

Recognizing that ERISA does not expressly authorize relief against nonfiduciaries for participation in a fiduciary breach, Petitioners and their *amici* posit that such relief should be incorporated into the statute or implied because such relief was available under the common law of trusts. Incorporation of this relief from the common law is chiefly supported by reference to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In *Bruch*, the Court resolved the issue of the appropriate standard of review for a court to apply in actions under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), challenging benefit eligibility determinations. 489 U.S. at 110-15. As ERISA sets forth no standard, this Court was "guided by principles of trust law" to impose a *de novo* standard of review. *Id.* The interstitial lawmaking *required* in *Bruch* by a gap in ERISA's provisions is a far cry from the Petitioners' request in this case that the Court create an entirely new claim which would impose liability for breach of fiduciary duty upon an entirely new class of persons. *Russell* bars such a result. The Eleventh Circuit in *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), *pet. for cert. filed*, 60 U.S.L.W. 3843 (June 1, 1992), put it aptly in stating that such a claim would "ignore the obvious care with which ERISA's remedial provisions are formulated, instead requiring us to supplement the statute with a substantive right against a party that Congress readily could have chosen to reach." 947 F.2d at 1581.

The lessons of this Court's decisions make clear that it is not to be easily presumed that rights, liabilities, and remedies not expressly authorized under ERISA were omitted through inadvertence or an intent to leave the matter to the courts' development of federal common law. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (quoting *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.")); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argues strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive."). Time and again the Court has emphasized the comprehensive and integrated nature of ERISA. Here, the plain text of ERISA, the structure of the entire statute, and its legislative history all require the conclusion that there is no gap in the fabric of the statute that permits the incorporation or implication of a cause of action for monetary damages against a nonfiduciary for participation in a fiduciary breach. Those decisions that have concluded otherwise[11] fail to give the appropriate deference to "an enforcement scheme

[11] Decisions implying a private right of action against nonfiduciaries for participating in a fiduciary breach were either decided before *Russell* or rely principally upon precedent decided before *Russell*.

crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 147.

To presume that Congress inadvertently omitted to authorize a cause of action against an entire class of persons for participation in a fiduciary breach would disregard ERISA's comprehensive treatment of fiduciary responsibility in Part 4 of Title I, 29 U.S.C. §§ 1101-1114, including provisions specifying who may be held liable for breach of fiduciary duty and the relief which is available from such parties. Of particular note is the fact that Congress saw the necessity of expressly providing in section 405 that liability for a breach of fiduciary duty extends not only to the fiduciary who committed the breach but also to a co-fiduciary if, among other circumstances "he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach." 29 U.S.C. § 1105(a)(1). It must be assumed that if Congress intended to create a parallel liability for nonfiduciaries, it would have acted with the same specificity.

Congress, moreover, sought to assure the efficacy of ERISA's scheme of fiduciary responsibility and accountability by broadly defining the term "fiduciary" to include any persons who exercise or possess discretionary authority or control over the management and administration of employee benefit plans or plan assets. ERISA § (3)(21)(A), 29 U.S.C. § 1002(21)(A). Yet, at the same time, the statute and its legislative history reflect that "Congress clearly contemplated the involvement of non-fiduciary parties with employee benefit plans when it drafted . . . ERISA."

Useden, 947 F.2d at 1581.[12] Thus, it was recognized that countless parties would offer and provide essential products and services to employee benefit plans or engage in transactions with plans under circumstances where they would neither be expected nor required to exercise discretionary authority or control on behalf of such plans, but would act on their own behalf or in a purely advisory or ministerial capacity. Precisely because such parties were expected to act on their own behalf or subject to the direction or discretion of others who were responsible for acting on behalf of the plan, they were not brought under the ERISA definition of "fiduciary" or made subject to ERISA fiduciary duties. Accordingly, to infer that Congress intended to hold nonfiduciaries equally accountable with fiduciaries for breaches of fiduciary duties would be totally inconsistent with this carefully drawn distinction made by Congress. The court in *Useden*, in rejecting such a result, properly recognized that "ERISA . . . embod[ies] a tailored law of trusts . . . which not only adopts familiar trust principles, but also supplements these principles with more exacting standards, *and* exempts from its reach certain

[12] For example, section 103 of ERISA requires statements from actuaries, accountants, and insurance companies. 29 U.S.C. § 1023. Additionally, exemptions or exceptions to the fiduciary responsibility provisions found in Part 4 were created for insurance contracts, ERISA §§ 401(b)(2), 403(b)(1), 408(b)(5) and (8), 29 U.S.C. §§ 1101(b)(2), 1103(b)(1), 1108(b)(5) and (8), and assets of an insurance company or assets of a plan held by an insurance company. ERISA § 403(b)(2), 29 U.S.C. § 1103(b)(2). Congress also recognized other such exceptions or exemptions under Part 4. *See, e.g.*, ERISA §§ 401(b)(1), 408(b)(4), (6), and (8), 29 U.S.C. § 1101(b)(1) (registered investment companies); 29 U.S.C. § 1108(b)(4), (6), and (8) (banks).

parties and activities that may have been amenable to suit under traditional trust law." *Id.* (emphasis original).[13]

Petitioners and their *amici* attempt to overcome the heavy weight of the evidence negating any congressional intent to authorize a cause of action under ERISA against nonfiduciaries by asserting that Congress could not have intended to have denied employee benefit plans important relief that was available under the common law of trusts, the absence of which would leave them with less protection than was available under the common law. Such an argument ignores the substantial overall degree to which ERISA has enhanced the relief available to employee benefit plans in the event that such plans are abused or mismanaged.[14] Moreover, it overlooks the extent to which ERISA reflects a careful balancing of interests which should not be undermined. *Pilot Life*, 481 U.S. at 54. As this Court acknowledged in *Russell*, "Congress was concerned [in enacting ERISA] lest the cost of federal standards discourage the

[13] On the other hand, Congress was readily capable of imposing liability on persons beyond "fiduciaries" when it wanted to create expanded liability. *See* ERISA §§ 501, 510, and 511, 29 U.S.C. §§ 1131, 1140, and 1141; 18 U.S.C. § 664.

[14] For example, exculpatory clauses which the common law had allowed, *see* Restatement (Second) Of Trusts § 222 (1959), are invalidated by section 410 of ERISA, 29 U.S.C. § 1110, which in balancing the need for redress allows for certain forms of liability insurance. In addition, ERISA imposes bonding requirements upon plan fiduciaries. ERISA § 412, 29 U.S.C. § 1112. Finally, ERISA provides as a safety net a program of plan termination insurance administered by the Pension Benefit Guaranty Corporation. ERISA §§ 4001-4071, 29 U.S.C. §§ 1301-1371.

growth of private pension plans." *Russell*, 473 U.S. at 148 n.17 (citation omitted).

A cause of action against nonfiduciaries undoubtedly would provide employee benefit plans with additional sources of recovery in the event of fiduciary breaches. At the same time, however, such a cause would undoubtedly affect the availability and cost to employee benefit plans of essential products and services. It would expose the providers of services and products to potential litigation for monetary damages in all cases where plan fiduciaries were alleged to have breached fiduciary duties in purchasing their products, in acting on their professional advice, or in directing the performance of their administrative services.[15] ERISA and its legislative history make it clear that such providers are generally not intended to be treated as fiduciaries under ERISA and are therefore relieved of any fiduciary duties or attendant liabilities in connection with their interaction with employee benefit plans. It would be particularly unreasonable to assume, then, that such persons were intended to be made subject to liability as the result of the violations of duties by others.

[15] The Second Circuit has concluded that no intent to harm need be proven against the nonfiduciary and that a nonfiduciary's constructive knowledge of a fiduciary breach is established if a reasonably diligent investigation would have revealed the breach. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 282-84 (2d Cir. 1992). Thus, at least under the Second Circuit's interpretation of this cause of action, no party can safely sell a product to a plan fiduciary or act at a plan fiduciary's direction in reliance on the belief that the fiduciary is acting consistently with its duties.

3. ERISA Section 502(a)(3) Does Not Authorize A Private Cause Of Action Against Nonfiduciaries For Knowing Participation In A Fiduciary Breach

In the absence of any express authorization of a cause of action against nonfiduciaries in those provisions of ERISA which specifically establish liability for breach of fiduciary duty (*i.e.*, sections 409 and 405), and in light of this Court's holding in *Russell* which precludes the incorporation or implication in those provisions of any relief not expressly authorized, Petitioners and their *amici* assert that such authorization can be implied in section 502(a)(3) which permits participants, beneficiaries, or fiduciaries to obtain "other appropriate equitable relief" to redress violations or enforce provisions of ERISA Title I. 29 U.S.C. § 1132(a)(3). Thus, they attempt to impose liability on nonfiduciaries for participation in a fiduciary breach through the remedial language of one of ERISA's enforcement provisions. Regardless of the particular remedies available as "other appropriate equitable relief" under section 502(a)(3), Petitioners' reliance on that provision is flawed at the outset. As recognized by the Ninth Circuit in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), whether the common law of trusts supplies a form of remedy for violation of ERISA's fiduciary standards is distinct from resorting to "the common law of trusts [to supply] a federal cause of action where the statute itself provides none." 845 F.2d at 872. The arguments of Petitioners and their *amici* ask the Court to disregard this distinction and read section 502(a)(3) as creating substantive obligations and liabilities nowhere expressed in ERISA.

However, the provisions of section 502(a) are merely "an integrated system of procedures for enforcement." *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citation omitted). They do not create causes of action of their own force and effect—rather they permit the enforcement of rights and liabilities grounded, in each instance, elsewhere in ERISA or in a covered employee benefit plan. Suits under section 502(a)(3) expressly require in the first instance a "violation" of either ERISA or the terms of a plan, but the statute on its face does not provide for nonfiduciary responsibility, or liability. Thus, Petitioners cannot rely upon section 502(a)(3) to avoid the clear import of the express omission of a nonfiduciary liability claim in ERISA's fiduciary responsibility provisions. *See Davis v. Passman*, 442 U.S. 228, 239 (1979) ("question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive"). Accordingly, ERISA does not in section 502(a)(3) have a statutory back door through which Petitioners may conveniently enter the federal courts when the front door is securely locked.

Moreover, because monetary and equitable relief is expressly available under fiduciary breach claims brought pursuant to sections 502(a) and 409(a), permitting recovery under subsection (a)(3) would render subsection (a)(2) superfluous, a result "contrary to a fundamental canon of statutory construction." *Nieto*, 845 F.2d at 873. *Accord Useden v. Acker*, 947 F.2d 1563, 1580 (11th Cir. 1991), *pet. for cert. filed*, 60 U.S.L.W. 3843 (June 1, 1992). Such an interpretation does not render, as *amicus* United States asserts, section 502(a)(3)(B) "essentially useless." Brief for

United States at 23-24. Section 502(a)(3) permits actions for equitable relief against fiduciaries, as well as against other persons, for breach of the terms of a plan or ERISA's numerous *nonfiduciary* provisions regarding matters such as reporting and disclosure, vesting and funding, and interference with protected rights. Affirmance of the Ninth Circuit's ruling clearly will not result in section 502(a)(3) being deprived of any "substantial purpose."

B. EVEN IF ERISA SECTION 502(a)(3) WERE TO BE CONSTRUED TO AUTHORIZE A CLAIM AGAINST NONFIDUCIARIES FOR KNOWING PARTICIPATION IN A FIDUCIARY BREACH, IT WOULD NOT PERMIT MONEY DAMAGES

Petitioners argue that the relief they seek, which undeniably constitutes money damages, is authorized under ERISA section 502(a)(3)'s provision for appropriate equitable relief as "make whole" relief traditionally available in common law equity courts. Petitioners' Brief at 19. This argument springs from a misapplication of the "exclusive jurisdiction" of common law equity courts "over actions involving a trustee's breach of his fiduciary duties." *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 110 S. Ct. 1339, 1348 n.8 (1990). As a consequence of their exclusive jurisdiction, equity courts were able to establish purely legal rights and grant legal remedies in cases within their jurisdiction. 1 John N. Pomeroy, Equity Jurisprudence § 181 at 257 (Symons ed., 5th ed. 1941). Yet as this Court recognized in *Terry* (an action involving the question of right to a jury trial), the "nature of the relief" requested is "more important" than the jurisdiction of courts in equity. 110 S. Ct. at 1348 n.8. The Court concluded that since the employees sought money damages, they were entitled

to a jury trial. *Id.* at 1348-49.[16] Under Petitioners' reasoning any form of legal or equitable relief would be available under Section 502(a)(3) because all such forms of relief were available in common law equity courts. Such was clearly not the intent of Congress. *Russell*, 473 U.S. at 148 ("In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence—in the statute itself and in its legislative history—of any reference to an intention to authorize the recovery of extra-contractual damages.") (footnotes omitted).

A vast majority of courts have rejected attempts to recover extra-contractual or monetary damages under section 502(a)(3). These courts have construed the word "'equitable' to mean what it usually means—injunctive or declaratory relief." *Sokol v. Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986). *See Novak v. Andersen Corp.*, 962 F.2d 757, 759 (8th Cir. 1992), *pet. for cert. filed*, 61 U.S.L.W. 3156 (Aug. 26, 1992) ("We do disagree . . . with [the] proposition that an award of monetary damages is equitable relief under ERISA."); *First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546, 1553 (11th Cir. 1992) ("We must reject [the] argument that the phrase 'equitable relief' in § 1132(a)(3) authorizes an award of compensatory damages. The omission of any mention of a right to legal remedies in § 1132(a)(3) must be

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[16] The Court recognized that damages were equitable in nature only where they were "restitutionary" or were "incidental to or intertwined with" injunctive relief. 110 S. Ct. at 1348 (citations omitted). Here, Petitioners' claim for restitution was rejected below and Petitioners did not seek review of that dismissal in this Court. *Mertens v. Hewitt Associates*, 948 F.2d 607, 612 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 49 (1992).

taken as an indication of Congress' intent to limit relief available under this section to that which is equitable in nature.") (footnote and citations omitted), *petition for cert. filed*, 61 U.S.L.W. 3371 (Oct. 28, 1992); *Harsch v. Eisenberg*, 956 F.2d 651, 656 (7th Cir.) ("Compensatory damages are a classic form of *legal*, not equitable, relief.") (emphasis original), *cert. denied sub nom. Bihler v. Eisenberg*, 113 S. Ct. 61 (1992); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir.) ("'Other appropriate equitable relief' should be interpreted to mean what it says—declaratory or injunctive relief, not compensatory and punitive damages."), *cert. denied*, 488 U.S. 909 (1988). *See also Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1464 (5th Cir. 1986); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

Such interpretation is fully consistent with the report on ERISA of the Senate Finance Committee which reflects Congress' intent to give the term "appropriate equitable relief" its plain meaning:

> Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets . . . . Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary of Labor, participants or beneficiaries . . . .

S. Rep. No. 383, 93d Cong., 2d Sess. at 105-06, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4989. It also accords with the fact that in other provisions of ERISA,

equitable relief is clearly distinguished from compensatory damages and other forms of remedial relief. *See, e.g.*, ERISA § 409(a), 29 U.S.C. § 1109(a).

Finally, the exclusion of money damages from section 502(a)(3) is consistent with the interpretation of the term "equitable relief" in other federal statutes. The phrase "other equitable relief as the court deems appropriate" appeared in Title VII, 42 U.S.C. § 2000e-5(g) prior to the Civil Rights Act of 1991. Federal courts uniformly interpreted the phrase as not authorizing money damages. *See, e.g.*, *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986). This Court, moreover, as recently as this past Term recognized that "Title VII does not allow awards for compensatory or punitive damages." *United States v. Burke*, 112 S. Ct. 1867, 1873 (1992). Hence, the monetary damages sought by Petitioners in this case should not be available under section 502(a)(3) of ERISA.

C. ERISA SECTION 502(*l*) PROVIDES NO SUPPORT FOR ALLOWING A PRIVATE RIGHT OF ACTION AGAINST NONFIDUCIARIES FOR KNOWING PARTICIPATION IN A FIDUCIARY BREACH

Petitioners are not aided by section 502(*l*), the civil penalty action added to ERISA in 1989 which authorizes the Secretary of Labor to impose a fine upon fiduciaries who breach their fiduciary duties and other persons who knowingly participate in a fiduciary breach. 29 U.S.C. § 1132(*l*)(1). That provision, in defining the "applicable recovery amount" for purposes of calculating the 20% penalty, refers to amounts recovered from a fiduciary or other person in "proceedings instituted by the Secretary under subsection

(a)(2) or (a)(5) of [section 502]." *Id.* at § 1132(*l*)(2). Petitioners argue there would be no "recovery amount" upon which to base the 20% penalty if section 502(a)(5), which contains "other appropriate equitable relief" language similar to section 502(a)(3), did not authorize monetary damages. *See* Petitioners' Brief at 15. Accordingly, Petitioners (and their *amici*) assert, section 502(*l*) "confirms" the original intent of Congress to authorize actions to recover money damages against nonfiduciaries for knowing participation in a fiduciary breach. *See* Brief for United States at 18; *see also* Petitioners' Brief at 16.

As the Ninth Circuit recognized, however, section 502(*l*) "applies to the Secretary only, not to plan participants." *Mertens v. Hewitt Associates*, 948 F.2d 607, 611 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 49 (1992).[17] Furthermore, an addition to ERISA in 1989 of a penalty action expressly limited to the Secretary of Labor is hardly a relevant basis for determining whether the omission of a cause of action by a Congress fifteen years earlier was deliberate. At the same time, even if Congress in adopting section 502(*l*) acted on the basis of an opinion that ERISA already provided a right of action for monetary damages against nonfiduciaries, any opinion attributed to a subsequent Congress acting fifteen years after ERISA's original enactment cannot be considered evidence of Congress' intent. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 199-200 (1963).

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[17] Congress amended section 502(a)(6) to empower the *Secretary* to enforce section 502(*l*), 29 U.S.C. § 1132(a)(6), and the "applicable recovery amount" is ascertained with respect to "judicial proceedings instituted by *the Secretary*." ERISA § 502(*l*)(2)(B), 29 U.S.C. § 1132(*l*)(2)(B) (emphasis added).

Indeed, a proposed amendment to specifically create a cause of action for knowing participation in a fiduciary breach intended to overrule *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) was deleted from the same legislation in which section 502(*l*) was included. *See* H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6)(A), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). Since the proper application of *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), requires the conclusion that Congress did not intend to authorize either a cause of action against nonfiduciaries or the recovery of monetary damages as a form of "appropriate equitable relief" when it created ERISA in 1974, the subsequent failure of Congress to amend the statute to specifically provide such authority can only bolster that conclusion. *Cf. Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988) ("Once Congress was sufficiently aware of [an issue] . . . Congress' decision to remain silent concerning [the issue] 'acknowledged and accepted the practice, rather than prohibiting it.'") (citation omitted).

In fact, the legislative history of section 502(*l*) reveals that it was simply a compromise substituted for the Senate's desire to increase the premiums paid by plans to the Pension Benefit Guaranty Corporation. "In lieu of the premium increase, the conferees agreed to strengthen the Secretary of Labor's authority to enforce ERISA by providing for a mandatory civil penalty for certain violations." H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. *reprinted in* 1989 U.S.C.C.A.N. at 3018. It reflects no intent to provide participants or beneficiaries with a cause of action against nonfiduciaries. At most, it reflects that Congress was aware of some decisions that awarded

"amounts" to the Secretary under sections 502(a)(2) or (a)(5). Petitioners' argument would have the definition of the term "applicable recovery amount" in section 502(*l*) provide an entire cause of action in favor of private parties that is nowhere to be found in the statute's comprehensive substantive, or integrated enforcement, provisions. It should be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), provides:

Definitions

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibilities to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

ERISA § 103, 29 U.S.C. § 1023, provides in relevant part:

Annual reports

(a) Publication and filing

(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this subchapter is maintained by—

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 1002(16)(B) of this title,

such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

* * *

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 1024(a)(2) of this title, a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

ERISA § 401, 29 U.S.C. § 1101, provides in relevant part:

Coverage

* * *

(b) For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the

amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA § 403, 29 U.S.C. § 1103, provides in relevant part:

Establishment of Trust

(a) Benefit plan assets to be held in trust; authority of trustees

* * *

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

* * *

ERISA § 405(a), 29 U.S.C. § 1105(a), provides:

Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

ERISA § 408, 29 U.S.C. § 1108, provides in relevant part:

Exemptions from prohibited transactions

* * *

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

* * *

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qual-

ified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such

bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

* * *

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company or an affiliate thereof) who has authority to manage and control the assets of the plan.

ERISA § 409(a), 29 U.S.C. § 1109(a), provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use

of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

ERISA § 410, 29 U.S.C. § 1110, provides:

Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

ERISA § 412(a), 29 U.S.C. § 1112(a), provides:

Bonding

(a) Requisite bonding of plan officials

Every fiduciary of an employee benefit plan and every person who handles funds or other property of such

a plan (hereafter is this section referred to as "plan official") shall be bonded as provided in this section; except that—

(1) where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer, the administrator, officers, and employees of such plan shall be exempt from the bonding requirements of this section, and

(2) no bond shall be required of a fiduciary (or of any director, officer, or employee of such fiduciary) if such fiduciary

(A) is a corporation organized and doing business under the laws of the United States or of any State;

(B) is authorized under such laws to exercise trust powers or to conduct an insurance business;

(C) is subject to supervision or examination by Federal or State authority; and

(D) has at all times a combined capital and surplus in excess of such a minimum amount as may be established by regulations issued by the Secretary, which amount shall be at least $1,000,000. Paragraph (2) shall apply to a bank or other financial institution which is authorized to exercise trust powers and the deposits of which are not insured by the Federal Deposit Insurance Corporation, only if such bank or institution meets bonding or similar requirements under State law which the Secretary determines are at least equivalent to those imposed on banks by Federal law.

The amount of such bond shall be fixed at the beginning of each fiscal year of the plan. Such amount shall be not less than 10 per centum of the amount of funds handled. In no case shall such bond be less than $1,000 nor more than $500,000, except that the

Secretary, after due notice and opportunity for hearing to all interested parties, and after consideration of the record, may prescribe an amount in excess of $500,000, subject to the 10 per centum limitation of the preceding sentence. For purposes of fixing the amount of such bond, the amount of funds handled shall be determined by the funds handled by the person, group, or class to be covered by such bond and by their predecessor or predecessors, if any, during the preceding reporting year, or if the plan has no preceding reporting year, the amount of funds to be handled during the current reporting year by such person, group, or class, estimated as provided in regulations of the Secretary. Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official, directly or through connivance with others. Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 9304-9308 of Title 31. Any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule or blanket forms of bonds which cover a group or class.

ERISA § 501, 29 U.S.C. § 1131, provides:

Criminal penalties

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

ERISA § 502(a), 29 U.S.C. § 1132(a), provides:

Civil Enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

ERISA § 502(*l*), 29 U.S.C. § 1132(*l*), provides:

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with

respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 510, 29 U.S.C. § 1140, provides:

Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

ERISA § 511, 29 U.S.C. § 1141, provides:

Coercive interference

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.]. Any person who willfully violates this section shall be fined

18 U.S.C. § 664, provides:

Theft or embezzlement from employee benefit plan

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.